Supreme Court, U.S.
FILED
2010

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(1)

In the
Supreme Court of the United States

SUSAN M. FOX,

Petitioner,

v.

TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 12, 2010

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QUESTIONS PRESENTED

(1) Whether a public elementary school special education teacher who complains that her job assignment illegally reduces the number of hours that a school district should be providing to special needs students is speaking "as a citizen" on a matter of public concern so that her speech is protected by the First Amendment under this court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

(2) Whether the inquiry into the protected status of speech remains one purely of law as stated in this court's decision in *Connick v. Myers*, 461 U.S. 138 (1983) or has *Garcetti* transformed it into a mixed question of fact and law so as to permit a jury to determine whether one is speaking "as a citizen".

(3) Whether this court should revisit its decision in *Garcetti* to limit its holding to persons whose public employment involves the exercise of policy-making or confidential or discretionary duties on behalf of elected officials, recognizing that there is a compelling interest in promoting free speech among government employees who perform merely ministerial functions.

CORPORATE DISCLOSURE STATEMENT

Petitioner Susan Fox is an individual. Respondent Traverse City Area Public Schools is a Michigan municipal corporation, but it is not a publicly traded stock company. Respondent Traverse City Area Public Schools Board of Education is a group of elected individuals. Respondents Christine M. Davis and Robert T. Peters are individuals.

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Susan Fox, plaintiff in the district court, respectfully petitions this court for a writ of certiorari to review the judgment of the U.S. Circuit Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 605 F.3d 345 (6th Cir. 2010) and is reproduced in the Appendix herein at Pet. App.1a to 12a. The decision of the U.S. District Court for the Western District of Michigan is not reported, since it was orally announced from the bench, but the transcript is reproduced in the Appendix Pet. App. 18a – 29a.

JURISDICTION

The judgment of the court of appeals was issued May 17, 2010. Pet. App. 13a – 14a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1871, set forth at 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

> that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case brings before this court the issue of when a public school teacher's speech rights are protected under this court's decision in *Garcetti v. Ceballos,* 547 U.S. 410 (2006). It also provides a vehicle for this Court to answer a question which has produced a split in the circuits – as pointed out by the Sixth Circuit's opinion at Pet. App. 10a – 11a (605 F.3d at 350-1) whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick v. Myers,* 461 U.S. 138 (1983), or whether, instead, *Garcetti* has transformed it into a mixed question of fact and law. This case also permits this Court to clarify whether the *Garcetti* test regarding when speech will be protected applies across the board to all public employees, including the public school special education teacher in this case, or whether it would be better to limit the test to public employees, like the assistant district attorney in *Garcetti,* who exercise discretionary duties on behalf of an elected official.

The petitioner, Susan Fox, brought an action under 42 U.S.C. § 1983, alleging that the respondent Traverse City Area Public Schools, acting through the school board and the individual defendants,

terminated her employment because she complained that the size of her teaching caseload prevented her from providing special needs students the hours of instruction that they were entitled to receive from her. Pet. App. 2a. Fox was hired to teach at Blair Elementary School under a probationary contract for the school years 2005-2006 and 2006-2007. In February she was notified that she would not be renewed for the following year. According to the defendants, the non-renewal was because of performance deficiencies dating back to early 2006. Pet. App. 3a. Fox disputed claims that her performance was deficient and maintained that she was terminated for voicing concerns to her supervisors that the size of her teaching caseload exceeded that allowable by law – thereby shorting special needs students their required hours with her. Pet. App. 3a – 4a. Specifically, in the fall of 2006, she was assigned 21 special education students, which is the maximum number allowed by Michigan law. She was also assigned to teach a reading program called "READ 180". This added 13 more special education students, taking her caseload to 34 students per day, and reducing the time that she spent with each special education student. Pet App. 30a – 31a.[1] In September 2006, she complained to Robert Peters that her increased caseload put the district out of compliance with the law. Pet. App. 32a. On September 22, 2006, Kim Urbanski, another supervisor curtly told her in response to Ms. Fox's complaints, "Susan, don't you

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[1] The "Affidavit of Susan M. Fox", referenced here, is reproduced in Petitioner's Appendix, it was filed March 4, 2009, as Doc # 74-5 in the district court

worry about the laws; you worry about your caseload." Pet. App. 33a.

Fox alleged that prior to the time that she complained about the district being not in compliance with the law, she received evaluations from her supervisors, dated 11/29/05, 3/7/06, and 3/23/06, praising her work; but that after she reported this non-compliance with the law to her supervisors, she was met with hostility that ultimately resulted in the notice of non-renewal that she received in February 2007. Pet. App. 4a and 30a – 33a. Fox conceded that she did not file a formal grievance with her union, nor did she voice her concerns over the illegal workload assignment outside of the ordinary chain of command at her school. There was no evidence in the record that reporting non-compliance with the law was part of the job description for a special education teacher, or that such reporting was customarily expected of special education teachers. In fact the admonition of supervisor Kim Urbanski, quoted above, was *some* evidence that the district did not regard the reporting of non-compliance as within the job duties expected of a special education teacher.

The district court granted summary judgment to the defendants on the civil rights claim under 42 U.S.C. § 1983 and dismissed the pendent state-law claims. Pet. App. 2a. The court did not make factual findings on the issue of whether or not Fox's performance was deficient or whether, as Fox claimed, the allegations of deficient performance were merely a pretext covering up the district's dissatisfaction with her because of her insistence on compliance with the law. Pet. App. 24a – 25a. Rather, the district court assumed for the purposes of the motion for summary

judgment that Fox was fired because she spoke out. This was the holding of the district court in granting the motion for summary judgment:

> So let's assume for purposes of the analysis here, and only for purposes of the analysis, that what Ms. Fox says she told her supervisors is what led to the adverse action. I'm making no finding on that. I'm saying let's assume for purposes of the summary judgment analysis that happened.
>
> It seems to me that under Garcetti you have to find that the speech in order to be protected under the first element of the prima facie case would have to be made as a citizen and on matters of public concern, and I think this falters on the "as a citizen" prong of Garcetti, just as I thought in the Meggison case that the plaintiff's claim faltered on the same prong.
>
> There's no dispute here that the statements that Ms. Fox said she made to her supervisors involved directly her complaints about workload. She said, "I shouldn't have this number of people. It's not appropriate under the law." And it related directly to the special ed students in her charge.
>
> It's hard for me to see, frankly, a clearer case of Garcetti applying in the context of a public employee's speech. (Pet. App. 24a – 25a.)

Fox appealed the decision, saying that the district court erred in that there existed a genuine issue of material fact as to whether, in voicing her complaint about her caseload, she was speaking "as a citizen" for purposes of a *Garcetti* analysis with respect to her First Amendment civil rights claim. Pet. App. 4a.

The Sixth Circuit Court of Appeals affirmed, holding that plaintiff had failed to establish that her speech was protected and that, therefore, the defendants were entitled to judgment as a matter of law. Pet. App. 12a. The Sixth Circuit noted in its opinion that the threshold question of whether one is speaking "as a citizen" and on "a matter of public concern" (the *Garcetti* test) was a question that was answered in some circuits by the court as a matter of law, while, in other circuits, it was answered by a jury as a mixed question of fact and law. Pet. App. 10a – 11a. The Sixth Circuit said that it would side with the Fifth, Tenth, and District of Columbia Circuits, holding that this is a question of law, while acknowledging that the Third, Seventh, Eighth, and Ninth Circuits would submit the question to the jury as a mixed question of fact and law. *Id.*

Fox now brings this petition for a writ of certiorari, saying (1) the district court and the court of appeals were wrong in their application of the *Garcetti* test – even assuming that the question was one of law for the court to decide; (2) the district court and the court of appeals should have denied summary judgment since the threshold question of whether one speaks "as a citizen" is quintessentially a question of fact for a jury to decide; and (3) this court should refine the *Garcetti* test to recognize that there should be different tests to determine protected speech of public employees tailored to fit the differing levels of job responsibilities of differing sets of public employees.

REASONS FOR GRANTING THE WRIT

I. ASSUMING THAT THE *GARCETTI* TEST IS AN ISSUE FOR THE COURT ALONE TO DECIDE, WITHOUT A JURY, THE DISTRICT COURT AND THE COURT OF APPEALS MISAPPLIED THE TEST SINCE PLAINTIFF WAS SPEAKING "AS A CITIZEN" ON BEHALF OF THE SPECIAL EDUCATION STUDENTS WHO WERE NOT BEING AFFORDED THE HOURS OF INSTRUCTION TO WHICH THEY WERE ENTITLED UNDER THE LAW.

The question of whether special needs students are receiving legally mandated education services is, without doubt, a matter of public concern. The district court judge impliedly concedes the "matters of public concern" part of the *Garcetti* test in its opinion granting the defendants' motion for summary judgment:

> So let's assume for purposes of the analysis here, and only for purposes of the analysis, that what Ms. Fox says she told her supervisors is what led to the adverse action. I'm making no finding on that. I'm saying let's assume for purposes of the summary judgment analysis that happened.
>
> It seems to me that under Garcetti you have to find that the speech in order to be protected under the first element of the prima facie case would have to be made **as a citizen and on matters of public concern**, and I think **this falters on the "as a citizen" prong of**

> **Garcetti....** (Pet. App. 24a – 25a; emphasis added.)

The clear implication of the district court's statement is that plaintiff's prima facie case would certainly not falter on whether it presents "matters of public concern."

In *Reinhardt v. Albuquerque Public Schools Board of Education,* 595 F.3d 1126 (10th Cir. 2010), the Tenth Circuit Court of Appeals, in a factually similar case, found that a special education teacher (a speech-language pathologist) raised a matter of public concern where she, as the plaintiff here, complained that the defendant school district was not providing the legally required special education services to the students who qualified for those services. The district court granted the defendant school district's motion for summary judgment, holding that under *Garcetti* the plaintiff was not speaking "as a citizen" since her speech was made pursuant to her job duties. The Tenth Circuit reversed, holding that the plaintiff's advocacy on behalf of her students was speech that was not a required part of her job duties. Both the district court and the court of appeals apparently agreed, however, that advocacy on behalf of special needs students was certainly a matter of public concern.

Petitioner recommends the analysis of the Tenth Circuit to this Court because, in petitioner's opinion, it demonstrates a properly reasoned application of the *Garcetti* test even in a circuit which holds that the test is to be applied by the court as a matter of law. As noted both previously and below, there is a split in the circuits with the Fifth, Sixth, Tenth and D.C. Circuits holding that the *Garcetti* test is to be addressed solely

as a matter of law by the court, while the Third, Seventh, Eighth, and Ninth Circuits, hold that the inherent factual issues regarding the scope of one's job duties and the subjective motivations which prompt a person to speak are necessarily questions of fact for a jury. In *Reinhardt*, the Tenth Circuit, without benefit of a jury, applied a factual analysis, which if similarly applied to Fox would require a reversal of the Sixth Circuit in *Fox* without having to address the question of whether a judge or jury should decide the *Garcetti* test. This is the Tenth Circuit's analysis (595 F.3d 1126, 1135-6):

> *Garcetti v. Ceballos* sets the boundaries of "protected" employee speech, and the parties agree that this is the controlling law. Aplt.App. 237. *Garcetti* recognized that employee speech made pursuant to the employee's professional duties is not afforded First Amendment protection. 547 U S. at 421, 126 S.Ct. 1951. We have noted that "[t]he question under *Garcetti* is not whether the speech was made during the employee's work hours, or whether it concerned the subject matter of his employment." *Thomas v. City of Blanchard*, 548 F.3d 1317, 1323 (10th Cir.2008). The key is "whether the speech was made pursuant to the employee's job duties or, in other words, whether the speech was commissioned by the employer." *Id.* (internal quotation marks and citation omitted). Rather than defining a comprehensive framework for defining the scope of an employee's duties, the Supreme Court emphasized that the inquiry is "a practical one," noting that "formal job descriptions often bear little resemblance to the duties an employee actually is expected to

> perform." *Garcetti,* 547 U.S. at 424-25, 126 S.Ct. 1951. Post *Garcetti,* this court has generally identified two factors that suggest an employee was speaking as a private citizen rather than pursuant to her job responsibilities: (1) the employee's job responsibilities did not relate to reporting wrongdoing and (2) the employee went outside the chain of command when reporting the wrongdoing. *See Thomas,* 548 F.3d at 1324-25; *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1204-05 (10th Cir.2007); *Casey v W. Las Vegas Indep. Sch. Dist.,* 473 F.3d 1323, 1330-33 (10th Cir.2007). Ms. Reinhardt's speech – filing the state complaint – satisfies both of these factors

In Fox's case, she satisfies only one of the two factors formulated by the Tenth Circuit; namely, the fact that her job responsibilities did not relate to reporting wrongdoing. It is conceded that Fox did not go outside the chain of command in order to complain about or report the wrongdoing. The fact that she does not satisfy both factors, however, should not be held against her because this Court has already held in *Garcetti* that employees do not have to go outside the office to be afforded First Amendment protection, and that in some cases expressions made totally within the workspace are protected (547 U.S. 410, 420). Therefore, the Tenth Circuit's gloss about going outside the chain of command must be read for what it is; namely, one factor that it likes to consider in its factual analysis, but not a controlling factor, since if applied literally, the Tenth Circuit would be contravening this court's holding in *Garcetti.*

As to the first factor, Reinhardt, like Fox, did not have a job responsibility to complain about or report the district's illegal avoidance of its duties to the students. Reinhardt, like Fox, was not a compliance officer. This is what the Tenth Circuit said with regard to Ms. Reinhardt (595 F.3d 1126, 1136):

> Ms. Reinhardt was not hired to ensure IDEA compliance at Albuquerque public schools. She was hired to provide speech and language services to special education students.

In like manner, Ms. Fox was not hired to ensure compliance at Traverse City Area Public Schools with the number of hours that were to be devoted to special education students. She was hired to be a special education teacher.

Applying the reasoning of the Tenth Circuit in *Reinhardt* (combined with this Court's admonition in *Garcetti* that speech does not lose its protection simply because it remains internal) the proper decision in this case would be to reverse the Sixth Circuit. As to the threshold question of whether this Court should grant the petition for a writ of certiorari, the difference in the result to the plaintiffs in *Reinhardt* and *Fox* calls out for this Court to act. In the one case the appellate court has applied what it believes to be a proper application of this Court's decision in *Garcetti* and has determined that the plaintiff spoke "as a citizen". Yet, in a very similar case an appellate court has applied what it also believes to be a proper application of this court's decision in *Garcetti* and has determined that plaintiff did not speak "as a citizen". In the enforcement of constitutional rights – especially with respect to a right so fundamental as the First

Amendment right of free speech – this difference in result based solely on geography should not be permitted.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE CONFLICT IN THE CIRCUITS AS TO WHETHER THE *GARCETTI* TEST PRESENTS MIXED QUESTIONS OF FACT AND LAW REQUIRING SUBMISSION TO A JURY TO RESOLVE CONTESTED ISSUES OF WHETHER A PUBLIC EMPLOYEE'S SPEECH WAS SPOKEN "AS A CITIZEN".

The Tenth Circuit's opinion in *Reinhardt, supra,* serves as an apt introduction to this part of petitioner's argument, since even though the Tenth Circuit is one of the circuits which regards the application of the *Garcetti* test as one of law for a court to decide, the reasoning of the court brings in a review and weighing of factual issues that are traditionally within the purview of a jury (and, therefore, in an unintended way, argues for the position advanced by the petitioner). Note that its first test is to ascertain whether the employee's job requires the employee to report wrongdoing. This is not an easy task since as this court has observed "the proper inquiry is a practical one," requiring more than mere mechanical reference to "[f]ormal job descriptions [which] often bear little resemblance to the duties an employee actually is expected to perform." *Garcetti,* 547 U.S. at 424-25. To fairly answer this question, it would seem necessary that a district court have the employee's formal job title, formal job description, any applicable informal job descriptions, testimony from the employee and the employer as to whether the reporting of

wrongdoing is customarily considered part of the job, testimony about past practices of similarly situated employees, and testimony of the affected employee as to what motivated him or her to speak.[2] If all of these factual matters are in the record (plus potentially other factual matters that may arise on a case by case basis) then, with such a record, a district court judge might be in a position to fairly answer the question. But with such a myriad of factual nuances inherent in such an inquiry, the answer would be best left to a jury.

The Tenth Circuit's second test, as noted above, if taken literally and applied strictly, contravenes this court's holding in *Garcetti* since this Court has held that it is not necessary that one go outside the internal chain of command to receive protection "as a citizen" for one's speech. This test does not mean that the Tenth Circuit wants to avoid the teachings of this Court on this issue; rather the statement of this second test by the Tenth Circuit shows once again that there are nuances unique to each case which help a finder of fact to determine whether or not a public employee was speaking "as a citizen". By asking whether the employee went outside the internal chain of command, a finder of fact can glean an insight of admittedly some relevance about whether the employee was speaking as a citizen. Certainly, where, when and to whom an employee speaks are important, since it is part of the context necessary to help resolve the question of whether the employee was advocating for a cause or simply griping about his or her job. But there is no

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[2] The district court record in this case is devoid of any evidence relating to these issues

comprehensive list of places, times, audiences, and other factors that can be referenced to answer this question. That is why any attempt to leave the resolution of this inherently fact-intensive question to a judge rather than a jury is a seriously flawed approach.

With regard to Ms. Fox's case, the Sixth Circuit fell into the same error as the Tenth Circuit in thinking that Fox's failure to go outside the internal chain of command was an important or determinative factor. The Sixth Circuit distinguished cases from the Ninth Circuit and Second Circuit, which petitioner had argued were factually similar as arising in the educational context. In *Posey v. Lake Pend Oreille School District,* 546 F.3d 1121 (9th Cir. 2008), the Ninth Circuit reversed the district court's grant of summary judgment on plaintiff's First Amendment claim where the plaintiff, a security specialist, found that his job had been eliminated after he wrote a letter to school district administrators complaining of safety and security breakdowns at his school. In *Cioffi v. Averill Park Central School District,* 444 F 3d 158 (2d Cir. 2006) the Second Circuit reversed the district court's grant of summary judgment where the plaintiff found that his job was abolished after he wrote letters to school district officials and held a press conference criticizing the school district for not reacting strongly enough to hazing incidents involving student football players. In both of these cases the respective courts of appeal held that the district court was in error in finding that the plaintiffs were not speaking "as citizens" under *Garcetti.* The Sixth Circuit in *Fox* distinguished these cases by saying that in both *Posey* and *Ciofi* the plaintiff "made statements outside the ordinary chain of command". (605 F.3d 345, 350.) The

Sixth Circuit also distinguished Fox's case from its previous holding in *See v. City of Elyria,* 502 F.3d 484 (6th Cir. 2007) by saying that the police officer in that case spoke "as a citizen" because his complaints about police department wrongdoing were reported to an outside agency, the FBI, rather than an internal bureau of the police department. Because of that distinction the Sixth Circuit held that, unlike Fox, the plaintiff in *See* made statements "obviously not made pursuant to the plaintiff's official duties " (605 F.3d 345, 349; Pet. App. 5a.) Again, the purpose of this critique of the Sixth Circuit opinion is not so much to point out that the opinion deviates from this Court's teachings in *Garcetti*; rather it is to demonstrate that district courts and courts of appeal are drawing inference from factual inquiries that are too narrow in their scope. If for instance, the police officer in *See* had been fired after making a complaint to internal affairs rather than the FBI, is there any real question that the Sixth Circuit would have said that his firing was justified? There is no doubt that the court would have found a way to determine that his speech was, indeed, protected. Conversely, if the court would have held that the officer could be fired because his speech was made pursuant to his job duties, the injustice of the decision would have pointed out that there is something starkly unjust and unworkable about the test.

The better course is to leave the question of whether one is speaking "as a citizen" to the wise care of a jury Although preferring its determination that the application of the *Garcetti* test is one for a judge, the Sixth Circuit did fairly set forth the split in the circuits – perhaps as an indication to this court that this question was ripe for review (605 F.3d 345, 350):

Finally, we reject the plaintiff's contention that the district court erred in treating the constitutional status of her speech as a matter of law, rather than a question of fact for a jury. Prior to the issuance of its decision in *Garcetti*, the Supreme Court treated "the inquiry into the protected status of speech [as] one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 103 S.Ct. 1684, 75 L.Ed.2d (1983). In *Garcetti*, however, the Court held that the question of whether a statement was spoken as a public employee or as a private citizen for First Amendment purposes was "a practical one," requiring a fact-specific inquiry into the "duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25, 126 S.Ct. 1951. **Unfortunately, whether the Court intended to retreat from the rule in *Connick* is not altogether clear from the language in *Garcetti*.** [Emphasis added.]

As the plaintiff correctly observes, the circuits are divided over "whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*, or if instead *Garcetti* has transformed it into a mixed question of fact and law." *Posey*, 546 F.3d at 1127. The Third, Seventh, Eighth, and Ninth Circuits have concluded that "whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." *Id.* at 1129; *see also Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir.2008); *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir.2008). Other circuits have stated that this remains a "question [] of law for the court to resolve." *Wilburn v. Robinson*, 480

> F.3d 1140, 1149 (D.C.Cir. 2007); *see also Charles v. Grief,* 522 F.3d 508, 513 n. 17 (5th Cir.2008) ("even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question of whether [the plaintiff's] speech is entitled to protection is a legal conclusion properly decided at summary judgment"); *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1202-03 (10th Cir.2007) (district court is to determine "whether the employee speaks 'pursuant to (his) official duties,'" "whether the subject of the speech is a matter of public concern," and "whether the employee's interest in commenting on the issue outweighs the interest of the state as employer"). Pet. App. 9a – 11a.

The Sixth Circuit concluded by saying that despite the split in the circuits, its post-*Garcetti* decisions have been consistent in holding that the application of the *Garcetti* test was a matter for the court alone, and not a jury. The Court said (605 F.3d. 345, 350-1):

> In our post-*Garcetti* opinions we have consistently described the question of whether, in a First Amendment retaliation action, a public employee's speech is protected as one of law, not one of both fact and law. *See Haynes,* 474 F.3d at 362 (citing *Taylor v. Keith,* 338 F.3d 639, 643 (6th Cir.2003) (public employee "must show that, as a matter of law, the speech at issue was protected"); *See,* 502 F.3d at 492 (citing *Connick,* 461 U.S. at 148 n. 10, 103 S.Ct. 1684) (whether an employee's speech is

> protected "is a question of law for the court to decide"). Pet. App. 11a.

Contrast the above statement with the holding of the Ninth Circuit as an example of the circuits who hold the other way (*Posey*, 546 F.3d 1121,1123):

> We conclude that, following *Garcetti*, the inquiry into whether a public employee's speech is protected by the First Amendment is no longer purely legal and presents a mixed question of fact and law.

In the context of Ms. Fox's case, she is asking this court to grant the writ so that the case will be remanded to district court with instructions to permit the case to proceed to a jury on the question of whether she was speaking "as a citizen" when she complained that her job assignment shorted the special education students the number of hours that they were to have with her. The factual analysis engaged in by the district court judge was facile and perfunctory. The district court, as quoted above, held that Ms. Fox was not speaking as a citizen based upon only two facts of relevance in the district court's opinion (Pet. App. 25a):

> There's no dispute here that the statements that Ms. Fox said she made to her supervisors involved directly her complaints about workload. She said, "I shouldn't have this number of people It's not appropriate under the law." And it related directly to the special ed students in her charge.

Absent from this record is any finding that Fox had a duty to speak as a result of her job description. The

district court judge could not have considered Ms. Fox's formal job description since that was not made a part of the record. There was no testimony from any witness to the effect that the reporting of non-compliance with the law was considered either formally or informally to be within the job duties or expected tasks of a special education teacher. The only evidence in the record which in some way addressed the issue of whether special education teachers had a duty to report non-compliance issues was the reported admonition of supervisor Kim Urbanski when she told Ms. Fox, "Susan, don't you worry about the laws, you worry about your caseload." Pet. App. 33a. A properly instructed jury could easily conclude that Ms. Fox was, indeed, speaking "as a citizen" when she voiced her complaints that the district was out of compliance with the law, since her speech was not a part of her expected duties as a special education teacher. Summary judgment was improper.

III. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO REFINE THE HOLDING IN *GARCETTI* TO PROVIDE GREATER PROTECTION TO THE SPEECH OF ORDINARY PUBLIC EMPLOYEES, SUCH AS PETITIONER, AS OPPOSED TO POLICY-MAKING PUBLIC EMPLOYEES CARRYING OUT CONFIDENTIAL OR DISCRETIONARY DUTIES SUCH AS THE ASSISTANT DISTRICT ATTORNEY IN *GARCETTI*.

The ability to restrict a public employee's speech, as is permitted by this Court's holding in *Garcetti*, makes sense when the public employee is in a policy-making position or is charged with carrying out confidential or

discretionary duties on behalf of his or her public employer, like the assistant district attorney in *Garcetti*; but the rule creates odd and unjust results when applied to the millions of public employees, who, like petitioner, perform ordinary ministerial functions.

The effect of *Garcetti* is to put conscientious public employees who observe wrongdoing in a no-win position. Because *Garcetti* affords protection to speech only if one speaks "as a citizen", and because the Sixth Circuit in this case, and other circuits as well, appear to require, or at least prefer, an employee to go outside of the usual internal chain of command in order to be thought of as speaking "as a citizen", an employee wishing to report or correct wrongdoing will find it in his or her best interest to simply keep his or her mouth shut. If the employee speaks up to only his or her supervisors, there likely will be no First Amendment protection. If, on the other hand, the employee takes his or her observations to the media, or otherwise creates a public furor, the employee may very well face discipline or dismissal under the line of authorities from this Court's decision in *Pickering v. Board of Education,* 391 U.S. 563 (1968) which permits public employers to discharge employee where their speech is too disruptive to the efficient working of government.[3]

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[3] See Christie S. Totten, "QUIETING DISRUPTION THE MISTAKE OF CURTAILING PUBLIC EMPLOYEES' FREE SPEECH UNDER *GARCETTI V. CEBALLOS*", Lewis & Clerk Law Review, Vol 12 1 p 233 at 247-249.

The federal, state, and local governments employ more than 21 million people.[4] These are the people who are in the best position to observe and report the myriad foibles of government, ranging from lack of compliance issues – as is the case here – to serious criminal activity. It does not make sense that we should have a public policy which has a chilling effect on the willingness of these employees to come forward with their observations. The police officer in *See v. City of Elyria, supra,* was protected by the Sixth Circuit because he made his complaints of police corruption to an outside agency, the FBI, rather than to internal affairs. In that case he was not deterred, and his speech was protected; but how is the average public employee to know what communication will be afforded protection and what communication will not? If a person has to guess, the most likely effect will be to maintain silence.

The better approach in *Garcetti*, and one that this Court can still adopt, is to limit *Garcetti* to its facts, recognizing that the assistant district attorney in that case, as an appointed representative of the Los Angeles District Attorney, was in a special relationship with his employer which involved the assistant district attorney in policy-making and carrying out confidential assignments on behalf of his employer. *Garcetti* held that the public employer "owns" the public employee's speech if the public employee was commissioned by the employer to provide that speech. That rationale seemed

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[4] U.S. Census Bureau, 2002 Census of Governments, Compendium of Public Employment: 2002, at 1 (Sept 2004) *available at* http //www census gov/govs/www/index html

appropriate because of Ceballos's position as one of Garcetti's appointees; but petitioner suggests that one size does not fit all when it comes to public employees. Assistant District Attorney Richard Ceballos may have been commissioned by District Attorney Gil Garcetti to speak for him, and, therefore, District Attorney Garcetti could fire Ceballos when he thought that Ceballos had made inappropriate or unsubstantiated findings of police misconduct. But should the District Attorney have the ability to fire, a secretary or a paralegal if he or she raises the same issue?

Petitioner suggests that the rule in *Garcetti* be limited to public employees who are in policy-making positions or who perform confidential or discretionary duties on behalf of their employers. This approach would be consistent with this Court's decisions in the related line of First Amendment cases defining when a public employer may choose to dismiss an employee for political differences. In *Elrod v. Burns,* 427 U.S. 347 (1976) this Court held that non-policymaking, non-confidential government employees of a sheriff's office could not be fired or threatened with dismissal for the sole reason that they were not affiliated with the political party of the current sheriff. In *Branti v. Finkel,* 445 U.S. 507 (1980) this Court addressed a similar question with regard to the dismissal of assistant public defenders. This court determined that like sheriff's deputies, public defenders were not policy makers nor were they engaged in confidential duties on behalf of their employer. This court distinguished public defenders from assistant prosecutors, noting that assistant prosecutors could be considered policy-makers or confidential employees acting on behalf of the elected prosecutor who appointed them.

Petitioner's suggested reconciliation is the following: In cases where the public employee holds a policy-making position or exercises confidential duties on behalf of his or her employer, there should be a presumption that one is not speaking "as a citizen" on a matter of public concern, since such a policy-making employee will rarely, if ever, have the right to publicly express opinions which differ from the person for whom he or she was hired to speak. In cases, however, where the public employee does not hold a policy-making position or exercises confidential duties on behalf of his or her employer, the presumption should be the opposite; namely, that one is presumed to be speaking "as a citizen" when the speech is directed to a matter of public concern. The decision as to whether or not a public employee holds a policy-making position should be, as it is now under *Elrod* and *Branti*, a threshold question of law for the court. In this way, public employees whose speech is truly commissioned or "owned" by the public employer will have only limited protection, since that is what they bargained for or accepted when they took the job on behalf of a public official. Conversely, non-policy makers, like petitioner, will be afforded protection if they have the temerity to speak up to say that their employer is not in compliance with the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-1688

[Filed May 17, 2010]

SUSAN M. FOX, *Plaintiff-Appellant,*	)
v.	)
TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS, *Defendants-Appellees.*	)

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 07-00956—Robert J. Jonker, District Judge.

Argued: March 9, 2010

Decided and Filed: May 17, 2010

Before: DAUGHTREY, GILMAN, and KETHLEDGE, Circuit Judges

COUNSEL

ARGUED: Carl J. Marlinga, MARLINGA LAW GROUP, PLLC, Clinton Township, Michigan, for Appellant. William Vogelzang, Jr., KLUCZYNSKI, GIRTZ & VOGELZANG, Grand Rapids, Michigan, for Appellee. **ON BRIEF:** Carl J. Marlinga, MARLINGA LAW GROUP, PLLC, Clinton Township, Michigan, for Appellant. William Vogelzang, Jr., Mark T. Ostrowski, KLUCZYNSKI, GIRTZ & VOGELZANG, Grand Rapids, Michigan, for Appellee.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Plaintiff Susan M. Fox, a former special-education teacher employed by the defendant school system, appeals the district court's order granting summary judgment to the defendants in this First Amendment retaliation action brought under 42 U.S.C. § 1983. The district court held that the case is controlled by the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and determined that, under *Garcetti*, the plaintiff's complaints to her supervisors about the size of her teaching caseload were not protected by the First Amendment. Specifically, the court held that the speech in question, if made by Fox at all, was made not in her role as a "public citizen" but as an employee, that it was made to her immediate supervisors, and that it did not address a matter of "public concern" but, rather, only the conditions of her employment. We agree, and we therefore affirm the decision of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Fox was hired to teach at Blair Elementary School under a probationary contract for the school years 2005-2005 and 2006-2007. In February 2007, she was notified that her contract would not be renewed for the following year, based on documentation of numerous performance deficiencies dating back to early 2006. Those deficiencies included the failure to complete the required student Medicaid and IEP reports in an appropriate and timely manner, the unauthorized delegation of responsibilities to teaching assistants, and the failure to provide the minimum required instructional time to students. Fox's performance evaluations also indicated that the school had received complaints fromparents that she was making inappropriate recommendations regarding medications for her students. She had been informed of these problems in periodic meetings with school officials during her probationary employment.

Fox disputed claims that her performance was deficient and maintained that she was terminated for voicing concerns to her supervisors, Blair Elementary School Principal Robert Peters and Special Education Director Kim Urbanski, that the size of her teaching caseload exceeded that allowable by law. It is undisputed that during the 2005-2005 school year, Fox carried a caseload of no more than the legal limit of 21 students. In the fall of 2006, however, Blair Elementary launched a targeted reading program designed to improve the reading skills of both general and special education students. Fox volunteered to participate in the reading program but was relieved of that responsibility after only four weeks because,

according to Principal Peters, she was falling behind in her other responsibilities.

Fox maintained that her participation in the reading program had made her responsible for a total of 34 students in various classes, which by her calculation put her over the legal number of students to supervise. She further alleged that when she reported this non-compliance to Peters and Urbanski in September 2006, she encountered hostility that ultimately resulted in the notice of non-renewal she received in February 2007, almost five months later. Peters, on the other hand, denied that Fox had ever complained that her caseload violated the law at any time prior to the date he informed her that her contract would not be renewed. Fox conceded that she had never filed a formal grievance with her union. Moreover, nothing in the record indicates that she voiced concerns that her caseload was "illegal" outside the ordinary chain of command at her school.

Fox ultimately filed suit in federal court, alleging a violation of her right to free speech under the First Amendment and also seeking recovery under several state-law theories. The district court granted summary judgment to the defendants on the civil rights claim and dismissed the pendent state-law claims. The court held that Fox's statements to her supervisors were not entitled to First Amendment protection and, therefore, that even if she had been fired for making them, there was no violation of a clearly established right, as required by section 1983. Fox now appeals the district court's summary judgment order, arguing that there exists a genuine issue of material fact as to whether, in voicing her complaint about her caseload, she was

speaking as a public citizen entitled to First Amendment protection.

DISCUSSION

To prevail in the district court on her claim of retaliatory discharge in violation of the First and Fourteenth Amendments, Fox would have had to show (1) that her statements were protected under the First Amendment; (2) that she suffered an adverse employment action; and (3) that "the adverse action was motivated at least in part as a response to the exercise of [her]constitutional rights." *Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 477-478 (6th Cir. 2006) (quoting *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 715 (6th Cir. 2001)). The district court determined that Fox failed to establish that her speech was protected and, therefore, that the defendants were entitled to judgment in their favor as a matter of law.

The parties agreed below that Fox's retaliation claim is controlled by the Supreme Court's opinion in *Garcetti*, as did the district court. Indeed, the district judge concluded, "It's hard for me to see, frankly, a clear[er] case of Garcetti applying in the context of a public employee's speech." We agree.

In *Garcetti*, the Supreme Court recognized that citizens who enter government service "must accept certain limitations on [their] freedoms," including limitations on the scope of their First Amendment rights. 547 U.S. at 418. Observing that public employees "do not surrender *all* their First Amendment rights by reason of their employment," the Court held that the interest of a public employee "in

commenting on matters of public concern" must be balanced against the interest of governmental employers "in promoting the efficiency of the public services it performs through its employees." *Id.* at 417 (emphasis added).

For a public employee's statements to receive First Amendment protection, the public employee must speak "as a citizen" and "address[] matters of public concern." *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 542 (6th Cir. 2007). "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421. Under *Garcetti*, "even employee speech addressing a matter of public concern is not protected if made pursuant to the employee's official duties." *Weisbarth*, 499 F.3d at 545. Thus, in reviewing a public employee's statement under *Garcetti*, we must consider both its content and context – including to whom the statement was made – to determine whether the plaintiff made the statement pursuant to her individual duties. *See id.*; *see also Haynes v. City of Circleville*, 474 F.3d 357, 362 (6th Cir. 2007).

Speech by a public employee made pursuant to *ad hoc* or *de facto* duties not appearing in any written job description is nevertheless not protected if it "owes its existence to [the speaker's] professional responsibilities." *Weisbarth*, 499 F.3d at 544 (quoting *Garcetti*, 547 U.S. at 421). In *Weisbarth*, for example, we concluded that a park ranger's statements about morale and performance issues to an outside consultant hired by the ranger department to assess these matters were made pursuant to her official duties, even though participating in the interview was

an *ad hoc* duty not described in the ranger's official job description. *Id.* at 543-44. Likewise, in *Haynes* we concluded that a police officer's memo to his superior officer expressing discontent about the financial cutbacks and changes to the canine-training program that he directed was not protected speech. *See* 474 F.3d at 365. The memo suggested that the cuts would open the police department to allegations of "negligence," "deliberate indifference," and "failure to train," *id.* at 360, but the plaintiff officer conceded that the new program complied with Ohio law. *Id.* at 365. In concluding that the plaintiff made these statements as a public employee rather than a private citizen, we cited the officer's involvement with the canine training program and the fact that he made the statements "solely to his superior." *Id.* at 364. The memo, therefore, communicated "nothing more than 'the quintessential employee beef: management has acted incompetently.'" *Id.* at 365 (quoting *Barnes v. McDowell*, 848 F.2d 725, 735 (6th Cir. 1998)).

Like the employee statements at issue in *Weisbarth* and *Haynes*, Fox's statements were made as a public employee rather than as a citizen and, therefore, do not merit First Amendment protection. As in *Haynes*, Fox's complaints were directed solely to her supervisor, not to the general public. She argues that because she did not control the number of students assigned to her class, her complaints about class size cannot have been made pursuant to her official duties. But the canine-training program administrator in *Haynes* did not control the level of funding allocated to his program, and yet we concluded that he made these statements as an employee rather than a citizen. It is clear – without any intricate parsing of Fox's job description – that her complaint about class size "owes

its existence to" her responsibilities as a special education teacher. *Weisbarth*, 499 F.3d at 544.

Nor, despite her contention to the contrary, is Fox aided by our opinion in *See v. City of Elyria*, 502 F.3d 484, 493 (6th Cir. 2007), in which we held that a city police officer's statements to the FBI alleging corruption within the city police department were constitutionally protected as a matter of public concern. Because the plaintiff officer reported his employer's illegal acts to an outside law enforcement agency, rather than solely to his supervisors, we held that those statements were obviously not made pursuant to the plaintiff's official duties. *Id.*

Fox next urges us to look beyond our own circuit precedent to the decisions of our sister circuits decided in the education context. However, our post-*Garcetti* decisions in *Weisbarth* and *Haynes* are controlling and, as indicated above, fully support the district court's grant of summary judgment, even though neither case arises in the context of education. Moreover, the out-of-circuit cases on which Fox relies, *Posey v. Lake Pend Oreille School District*, 546 F.3d 1121 (9th Cir. 2008),[1] and *Cioffi v. Averill Park Central School*

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[1] In *Posey*, the court found that there was a genuine issue of material fact as to whether the plaintiff, a security officer at a public high school, spoke as a public employee or a private citizen and reversed the district court's grant of summary judgment to the defendants on plaintiff's First Amendment retaliation claim 546 F.3d at 1129. The security officer wrote a letter to the school district chief administrative officer, superintendent, and other district administrators describing drug and weapons violations at the school and the principal's unresponsiveness to safety problems. *See id* at 1124 The plaintiff "wrote the letter at home,

District, 444 F.3d 158 (2d Cir. 2006),[2] are irrelevant to our analysis in this case, because both Posey and Cioffi, the plaintiff employees, made statements outside the ordinary chain of command and, therefore, their speech did not involve – as here – statements made by a public employee only to her immediate supervisors. Of more immediate pertinence to Fox's claim is the Fifth Circuit's observation that "[c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

Finally, we reject the plaintiff's contention that the district court erred in treating the constitutional status of her speech as a matter of law, rather than a question of fact for a jury. Prior to the issuance of its decision in *Garcetti*, the Supreme Court treated "the

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with his own resources, on his own time, and of his own initiative," and following the letter he met with school district officials at his home outside school hours to discuss his concerns. *Id.*

[2] In *Cioffi*, the court, anticipating the Supreme Court's forthcoming ruling in *Garcetti*, held that the plaintiff teacher and athletic director spoke as a citizen rather than a public employee when he made statements about a hazing incident at his school. 444 F.3d at 167 n.3. The school district uncovered incidents of hazing and sexual assault among the members of the football team, acts for which several students and teachers were arrested. *See id.* at 161. The plaintiff wrote a letter to the superintendent and school board and held a public press conference criticizing the football coach's supervision of the team and the school district's response to the incident. *Id.*

inquiry into the protected status of speech [as] one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). In *Garcetti*, however, the Court held that the question of whether a statement was spoken as a public employee or as a private citizen for First Amendment purposes was "a practical one," requiring a fact-specific inquiry into the "duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25. Unfortunately, whether the Court intended to retreat from the rule in *Connick* is not altogether clear from the language in *Garcetti*.

As the plaintiff correctly observes, the circuits are divided over "whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*, or if instead *Garcetti* has transformed it into a mixed question of fact and law." *Posey*, 546 F.3d at 1127. The Third, Seventh, Eighth, and Ninth Circuits have concluded that "whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." *Id.* at 1129; *see also Reilly v. City of Atlantic City*, 523 F.3d 216, 227 (3d Cir. 2008); *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir. 2008). Other circuits have stated that this remains a "question [] of law for the court to resolve." *Wilburn v. Robinson*, 489 F.3d 1140, 1149 (D.C. Cir. 2007); *see also Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008) ("even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question of whether [the plaintiff's] speech is entitled to protection is a legal conclusion properly decided at summary judgment"); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007) (district court is to determine "whether the employee speaks 'pursuant to (his)

official duties'," "whether the subject of the speech is a matter of public concern," and "whether the employee's interest in commenting on the issue outweighs the interest of the state as employer").

This circuit split is, however, ultimately irrelevant to the disposition of this case. In our post-*Garcetti* opinions we have consistently described the question of whether, in a First Amendment retaliation action, a public employee's speech is protected as one of law, not one of both fact and law. *See Haynes*, 474 F.3d at 362 (citing *Taylor v. Keith*, 338 F.3d 639, 643 (6th Cir. 2003) (public employee "must show that, as a matter of law, the speech at issue was protected"); *See*, 502 F.3d at 492 (citing *Connick*, 461 U.S. at 148 n.10) (whether an employee's speech is protected "is a question of law for the court to decide").

Moreover, in granting summary judgment in this case, the district court took as true all of the plaintiff's factual allegations. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"). The statements that Fox argues should receive protection under the First Amendment were made to her immediate supervisors at the school, and she does not dispute that the number of students assigned to her was directly related to the conditions of her employment. Even if the question were purely a question of fact, therefore, the district court properly granted summary judgment because the factual record presents no genuine issue for trial.

CONCLUSION

For the reasons set out above, we conclude that the district court correctly determined that, under *Garcetti*, when the plaintiff complained to her supervisor about the number of students assigned to her supervision, she spoke as a public employee rather than a private citizen. As a result, her statements were not entitled to protection under the First Amendment, and her retaliation claim was properly dismissed upon entry of summary judgment in favor of the defendants. The judgment of the district court is, therefore, AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1688

[Filed May 17, 2010]

SUSAN M. FOX,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS,	)
Defendants - Appellees.	)
	)

Before: DAUGHTREY, GILMAN, and KETH LEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:07-CV-956

[Filed April 24, 2009]

SUSAN M. FOX,	)
	)
Plaintiff,	)
	)
v.	)
	)
TRAVERSE CITY AREA PUBLIC SCHOOLS, et al.,	)
	)
Defendants.	)

HON. ROBERT J. JONKER

ORDER

This matter is before the Court on Plaintiff's First Motion in Limine (docket # 68) and Defendants' Motion for Summary Judgment (docket # 71). The Court heard oral argument on the motions on April 23, 2009. (*See* docket # 73.) Based on its review of the record, and for the reasons stated in detail in the hearing, the Court concludes that there exists no

genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

ACCORDINGLY, IT IS ORDERED.

1. Defendant's Motion for Summary Judgment (docket # 71) is **GRANTED**; and
2. Plaintiff's First Motion in Limine (docket # 68) is **DISMISSED AS MOOT**.

This case is **CLOSED**.

Dated: April 24, 2009

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:07-cv-0956

[Filed May 26, 2009]

SUSAN M. FOX, Plaintiff,	)
vs.	)
TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS, Defendants.	)

TRANSCRIPT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BEFORE THE HONORABLE ROBERT J. JONKER UNITED STATES DISTRICT JUDGE GRAND RAPIDS, MICHIGAN April 23, 2009

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building

110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by computer-aided transcription.

* * *

[p.38]

Rights Act does not encompass the Rehabilitation Act. That would be like saying just because there's a tort violation we've alleged all torts.

I would submit that's an unreasonable explanation. I also believe we submitted some Requests for Admissions that -- asking them to define what civil rights they were claiming, and I don't believe there was any reference to Section 504 of the Rehabilitation Act in those responses.

But at any rate, I think it's patently unreasonable to claim that you can just allege civil rights and that's going to include every possible statute that might provide you with a remedy. Thank you, Your Honor.

THE COURT: Okay. Anything else from either of the parties?

MR. MATHIEU: No, Your Honor.

THE COURT: Okay. Well, I appreciate the presentations. They are certainly thorough, and obviously both sides have been completely represented in their respective filings and in the argument here today.

I am going to go ahead and give you my ruling today because I think I'm well enough prepared to do that without further delay. And because at least the way I see the case, the admitted large pile of facts and some factual disputes turns out not to be controlling. At least in the Court's view on the First Amendment case, Garcetti is controlling and calls

[p.39]

for me to grant the defense motion, and I'm going to also grant the defense motion on the whistleblower and public policy claims based on the statute of limitations. And those are issues that I think don't require a lot more factual development or analysis for me to do, so I'll just give you the ruling here.

Let me start, though, with the Section 504 Complaint or request that that be the Complaint and to dispose of that, because I don't believe that's in the case. So to the extent the plaintiff is seeking to do that here, I'll deny that. And I'll tell you why I don't think it's in the case.

This is an issue that to some extent was embedded in what was presented to the magistrate judge. The request was to have leave to file an Amended Complaint which the magistrate denied by order dated I think October 9, 2008, for a variety of reasons. And certainly 504 is not specifically mentioned in there, and there's no suggestion that he's denying the motion because he thinks 504 is already in the case.

And then on December 18, 2008, the magistrate judge entered an order striking the plaintiff's Amended Complaint based on his earlier ruling and

specifically saying, We're going to go ahead on the original Complaint minus Counts IV and V.

Count I of that original Complaint entitled a violation of Civil Rights Act is what the plaintiff asserts

[p.40]

today is the source of the 504 claim, but I think that even under the most liberal reading possible of that count, it's not conceivable that 504 is in the case.

Certainly 504 could be characterized generally as a Civil Rights Act, but when I read the operative paragraphs of Count I, there's no reference at all to anything like Section 504. Instead I see repeatedly 30 and 31 paragraphs in particular that we're talking about plaintiff's constitutional rights of free speech and association in reporting the suspected violation of Michigan law. And paragraph 31 again referencing -- or Fourteenth Amendment protection presumably incorporating then what it says in the last line as a lawful exercise of the plaintiff's rights of free speech and association, again the First Amendment claims. It's repeated again in 32. And there's no -- and 33 as well. And there's no reference at all to anything that I think could remotely be construed as a Section 504 claim. So to the extent there's any kind of a new request for that, I'd deny it. I just don't think it's in the case at all. And if the case goes up, I think the parties will have to figure out if there was something else in front of the magistrate judge that compels a different result, but I do know that the two orders I mentioned are silent on it as I read them, and they weren't appealed in any event, and at this point after discovery

is closed and briefing has been done, it's really too late to open the door

[p.41]

to a brand-new theory of relief. So to the extent that 504 is an issue today, we'll leave it.

The motion in limine does have some interesting issues to me, but I'm going to put that to one side based on my view of what the dispositive questions are on the public policy and whistleblower and First Amendment claims. So I don't think I need to make a ruling on that. I'll just dismiss that as moot in light of where I'm going with the rest of the case.

Let me deal with the public policy and whistleblower claims first. First of all, I really think they amount to one in the same claim effectively and have to be analyzed under the Whistleblower Act. Dolan against Continental Airlines, 454 Mich 373, indicates from the Michigan Supreme Court that the Whistleblower Act is the exclusive remedy in a case like this for claims that somebody was subjected to adverse action in an employment setting based on the exercise of First Amendment rights reporting violations of law or alleged violations of law. So they merge into that statutory claim. And the statute has a 90-day limitations period.

The question is: Where does that 90 days run from? Is it the last date, June 30, 2007, on which the plaintiff says she was effectively employed? Or is it some earlier date, either the date of notification that she wasn't going to get a new contract and could have the

opportunity to resign instead, February 27, 2007? Alternatively, the March 12 date when I

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think the board accepted that resignation? Conceivably even the June 20, 2007, date, which was the last date of her contract, or I suppose the June 13 date which was the date she last worked actually physically at the school.

The only potential date that would save the claim here which was filed on September 25, 2007, is the June 30 date. And I don't think that works in this case for a number of reasons.

I actually think under Delaware State College against Ricks, which is the United States Supreme Court case that's discussed in the briefing, that the appropriate date for purposes of an action accruing under the act is the date the person has notice that the adverse employment action either has occurred or is inevitably occurring. In Delaware State College the facts were a little different and involved, as I recall, a tenured faculty member who was -- actually somebody who wanted to be tenured and who was denied tenure. It was ultimately going to result inevitably under the policy of that college in the person getting a one-year terminal contract and then out. And the Supreme Court in that case had no trouble saying that the accrual date was that date when the person got notice that his days were numbered, so to speak, at the college.

In fact, the Supreme Court says that ". . . when that mere continuity of employment without more is

insufficient to prolong the life of a cause of action for employment

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discrimination." That's quoting directly from the Supreme Court.

Now, it's not a State of Michigan case, that's true, but I think that the same kind of policies are in play and that once the person is on notice of an unequivocal adverse action, such as the plaintiff in this case, that, you know, it's time to start counting the 90 days. At the absolute outside it seems to me the end of the contract date, June 20, 2007, would have to be the end of the line. There's no dispute, at least in the contract which is Exhibit A to the defense brief, the contract date terminates June 20, 2007, and it seems to me whether there were any accrued vacation or any other reason administratively that somebody would be carried for a time up to June 30 in this case on the books of the school system, it really doesn't change the fact that clearly the contract is over and that there's not going to be a new one. So that the absolute outside date, it seems to me, would be June 20. And under any scenario then there would be no possibility of surviving the 90-day statute of limitations here.

The defense brief also includes a case from the Michigan Court of Appeals, Parker v. Cadillac Gage, which deals with a discriminatory tort, a discharge case, and in that case it's the actual last day worked that controls for purposes of the act involved there, and that subsequent severance, vacation pay, or otherwise doesn't affect it.

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If you look at the last day worked, I think on the undisputed record here it would be June 13. And, again, the 90 days would have expired. But the Court's finding is that the appropriate time to start counting is that notice date, as it was in the Supreme Court's case in Delaware State College. But even reading the most liberal possible interpretation that I would see on this record would be no later than June 20, 2007. And in either case, the statute of limitations then would bar the claim.

That would leave the First Amendment retaliation claim, which is the one that I think I've spent the most time talking about in oral argument and that in the Court's view really rises and falls on the application of Garcetti, the Supreme Court's relatively recent case involving speech and public employees. And I think it makes no bones about stating that public employees do have more limited rights than other citizens when it comes to potential discipline or adverse action for speech.

So let's assume for purposes of the analysis here, and only for purposes of the analysis, that what Ms. Fox says she told her supervisors is what led to the adverse action. I'm making no finding on that. I'm saying let's assume for purposes of the summary judgment analysis that happened.

It seems to me that under Garcetti you have to find that the speech in order to be protected under the first

[p.45]

element of the prima facie case would have to be made as a citizen and on matters of public concern, and I think this falters on the "as a citizen" prong of Garcetti, just as I thought in the Meggison case that the plaintiff's claim faltered on the same prong.

There's no dispute here that the statements that Ms. Fox said she made to her supervisors involved directly her complaints about workload. She said, "I shouldn't have this number of people. It's not appropriate under the law." And it related directly to the special ed students in her charge.

It's hard for me to see, frankly, a clear case of Garcetti applying in the context of a public employee's speech. It's certainly within the fair scope of her responsibility as a teacher to communicate with her supervisors on workload. That's what, in part, a teacher would do in any case, whether they thought there was a violation of law or otherwise, or if they thought there was somebody in the class that needed special attention or that required some other special arrangements that affected the overall load on the teacher and the potential for impact on other students.

It certainly falls within the policy concern of Garcetti that the administration or the government as employer have greater flexibility than the government as a sovereign, so to speak, to regulate speech, to make judgments about how to run its business or its school system in this case. And so

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even though you look at some of the cases including those cited in Garcetti and then in the Meggison case that I later authored and you say, Wow, it's sort of odd to invite somebody in the one case -- and I don't remember the name of it -- but to invite somebody to have a conversation with a consultant for the purpose of improving the employment setting and then terminate the person for what the employee said to the consultant, and yet that clearly fell within Garcetti. In the case of the K-9 officer, there was also direct communication about what was involved in the K-9 officer's job

The Garcetti opinion itself, as the plaintiff's counsel points out, has a reference near the end of the majority opinion to a response to Judge Suter's dissent in the context of education. And one of the things Justice Suter was concerned about was that academic freedom could be somehow impaired in applying Garcetti as the majority wrote it, but I think that however that may play out in the future, this isn't one of those cases.

The example, as I recall, involved teaching at the college level where academic freedom may be at its highest value. And in responding, at least I don't read the majority to say, Well, we're going to carve out a Garcetti exception. To the contrary, they say maybe there's something else, some other First Amendment value or line of cases that would apply or address that situation, but we'll leave that to another day.

[p.47]

And I'm reading toward the end then of that majority opinion when they directly address Justice Suter. "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this court's customary employee-speech jurisprudence. We need not and for that reason do not decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

I think in the context of that statement and Justice Suter's critique and the dissent, we're really talking about something different than a person in the secondary education setting or below who is talking about workload and IEPs for special ed students. I think we're talking there about the need to allow people who have unorthodox views, at least in some academic settings, to present them as a matter of preserving academic freedom and avoiding some government-enforced orthodoxy. However far that may go. And we all read in the papers about issues at school district levels, admittedly secondary ed, involving creationism and evolution, who is going to get to decide? Is it going to be the parents? Is it going to be the school board? Is it going to be the teachers? Whatever issues there may be with respect to curriculum content -- and I think that's the broadest reading you can give this exception -- we are not talking about

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curriculum content but the management of employees, the allocation of resources, the level of a student load. Those strike me as core Garcetti-protected functions of management And it's all about protecting the management's ability to run the school district in this case, and I don't see that potential refinement to the Garcetti analysis or addition to the Garcetti analysis as in play here on these facts.

So I think that when I look at Garcetti, laying aside what happened here, there's no possible way to conclude anything other than that the statements Ms. Fox says she made were made within the scope of her employment and pursuant to her employment as a special ed teacher, and for that reason even if that's what led to her adverse action here, and nobody is disputing that it was adverse action, then it's not First Amendment-protected speech and not a basis for a First Amendment claim.

So based on those thoughts, I'm going to grant the defense motion which would lead to dismissal of the case in its entirety, and we'll enter an Order to that effect and reference this decision, and then the parties can take it where it needs to go. Or if Mr. Mathieu thinks there's a new case in the offing, he's free to pursue that too. And I'm sure we'd have, you know, claim-preclusion issues and whatnot else, but I have no doubt that counsel on both sides will be able to manage whatever the sequelae of this Court's decision is.

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Any questions before we break? Mr. Mathieu?

MR. MATHIEU: Nothing, Your Honor.

THE COURT: Mr. Ostrowski?

MR. OSTROWSKI: No, Your Honor.

THE COURT: Okay. Thank you.

MR. VOGELZANG: Thank you, Your Honor.

THE CLERK: All rise, please. Court is adjourned.

(Proceeding adjourned at 4:16 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: May 26, 2009

/s/ Glenda Trexler

Glenda Trexler, CSR-1436, RPR, CRR

APPENDIX D

AFFIDAVIT OF SUSAN M. FOX

Background

I was hired as special education teacher by TCAPS for the 2005-2006 school year with between 14 and 17 students on my caseload. In that year Robert Peters complimented me on numerous occasions as to my effectiveness in providing a creative and sound instructional setting for my students. There were no problems with scheduling, homework folders, or negative comments. I heard wonderful comments from the teachers about how well the students were doing, from my special education supervisor, Ms. Kim Urbanski, complimenting my homework books and daily parent involvement; stating to me, "If all teachers would use these books, students would do so much better." Parents of my students were telling me their children were learning for the first time. The evaluations dated 11/29/05, 3/7/06, and 3/23/06 reflect this. Peters stated, in his final evaluation: "Her transition following the hiring process was very minimal, yet she worked hard since her feet hit the ground". This statement and others reflected I needed very little support.

In the fall of 2006, I was given the assignment to service 21 SPED students on my caseload which is the maximum number of students allowed. In addition, I was given another assignment to leave my classroom to teach a reading program called "READ 180".

However, in order to implement this program both state and federal rules and regulations require that school board and the principal include the READ 180 program into each student's Individualized Program Plan (IPP). Nothing was done over the summer by the administration to do this. The administration failed to provide a plan pursuant to R340.1832(1)(c) detailing how my students would receive IEP requirements with the new Read 180 general education program; this, notwithstanding an email dated June 16, 2006 from Jim Paris with the Compliance Office at the Michigan Department of Education stating how to legally assign a special education teacher for the Read 180 program.[1] This e-mail was sent to Terry Sheldon, the Read 180 grant administrator for TCAPS by Rick Bechtold (TBAISD monitor).

This added 13 more SPED students, taking my caseload to 34 students in violation of Michigan law and added 90 minutes of teaching per day. Also, because the program took my time away from my students my caseload maximum was required to be reduced proportionately, i.e. 15 students. Further, within my caseload I had three Level 3 behavior students, i.e., students with very severe emotional and behavioral problems. Level 3 students require one-on-one help in small settings with very structured programs. These students refuse to follow directions, complete assignments, pick on peers, threaten others, break things, throw objects, leave the room, sleep in the classroom, won't accept responsibility for their actions/behavior, instigate fights among peers and

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[1] See Ex G in Plaintiff's Brief in Opposition to Motion For Summary Judgment

often have a history of aggressive behavior at school and home.

Out of Compliance

Because this assignment was unlawful and virtually, physically impossible to fulfill. I complained to Robert Peters beginning on September 7th I advised him that the program was out of compliance and unlawful. I told him that leaving the classroom prevented my 21 students from getting their SPED rights by the IEP. Peters was disgusted with me going to him repeatedly. He did not understand that removing me for 90 minutes a day to teach in the GE program was preventing me from fully servicing my 21 SPED students.

My first indication that something was happening was when my aide told me that she was being questioned by Peters as to what she was doing in my class. He never came to me or discussed any issues regarding her with me. In February 2007 for the first time I learned that he was saying that I misused her time; this, although I used her exactly as I had in the first year, without complaint.

Overall I went to him with these complaints 6 times in the month of September. Each time he ignored me and became increasingly hostile.

I also called the Supervisor of Special Education, Ms. Kim Urbanski, on September 15 and September 18 and advised her of the problem-she told me "It is a building level problem Susan, take care of it there." Finally, on September 19, 2006 I insisted that she come over to Blair and sit down and look at the laws

vis-á-vis the READ 180 program. At the time Ms. Urbanski was overworked and frustrated because there was no leadership at the executive level since the Special Education Director's position was unfilled, however, she was knowledgeable in special education laws and I thought she would be helpful. My concern was for the students and the possibility of a lawsuit by the parents because their children's IEPs were not being followed. Her response to this third phone call was direct and abrupt: "Susan, don't you worry about the laws, you worry about your caseload." On September 22nd she finally came to the school and met with principal Peters in a closed meeting. I knew Kim was in the building because Peters came down to get the teachers caseload IEP's. He was furious and asked for the "Red Book" (student IEP's). He obviously knew I had called the supervisor. I expected to be called down at some time to meet with them. I expected to hear a "thank you" and affirmation that I did the right thing. I expected to hear an apology for that first month. I understood that everyone was under pressure with no executive director of SPED, however administration should have recognized this enormous risk they were taking. I was not called down to the meeting. This was not like Kim my first year. She always stopped to say "hello". On September 25th Robert Peters called me into the office the following Monday morning. He was angry and told me that "he had to" take me off READ 180 and reschedule the classes. Everything changed after this meeting. The retaliation against me was immediate and took many forms.

Initial Retaliation-False Accusations of Overdue IEPs

Robert Peter's initially began by telling others including administration that I was overdue with my IEPs and 30 day placements. I was not. He continued with a succession of notes in my mailbox, "overdue". When I would use my lunch hour time to gather the documents and show Peters the truth that they were not overdue he was dismissive and continued to falsely report to administration, "overdue". The IEPs were not "overdue"; unless Peters canceled, other administrators canceled or a parent canceled, He was angry when I "tabled" the IEP for lack of information, team members were absent; questioning and insinuating that I had control over "missing paperwork, team members". Tabling an IEP is legal and common with students who have an enormous amount of history. He refused to discuss these allegations and completely ignored any explanation offered.

Peters ignored a dangerous incident when a severely impaired level 3 student left my classroom while I was alone with 11 other students. I called the principal for help. There was no answer so I left a message. Now I learn from his testimony that he was in his office listening to my message and simply ignored me. In February 2007 when I was terminated he stated, as well as in his testimony, that this was an example that I was unable to handle my schedule.

Robert Peters subjected me to unusually excessive monitoring, micro-managing, recording, listening for any little piece of information to write about me (negative only).

After October 2 Peters told me on different occasions that looked "awful". I felt this was inappropriate. This was a significantly different attitude the first year.

In late October Robert Peters assigned Terry Sheldon to one of my classes supposedly as a support. Not until this litigation did I learn that she prepared a document highly critical of the reading program. This "support" was from an unqualified person who had no training or experience with special education students; in fact it would be illegal for her to teach this class. I subsequently learned in February of 2007 that Peters listed as a "concern" that I was using outdated reading materials. He did not tell me this in October; he only asked me to change the program-which I did immediately. Note that this program used materials he bought the year before and was the same program I used the year before without complaint.

November Meeting

I received and an e-mail note in my mailbox on Friday, November 10, 2006. Robert Peters was requesting a November 13 meeting in his office; he invited Kim Urbanski and John Scrudato. We were to discuss concerns and evaluation goals for me to focus on during this current evaluation cycle. I was looking forward to the meeting (since I never had the September 29 goal meeting required by the contract). I caught Bob in the hall Friday and asked if we were going to be discussing my goals that I had turned into him September 29? He said to bring them. I was pleased that Kim Urbanski and John Scrudato would be there for me. The students and staff had a very difficult first month with scheduling students support

time and with me out of my special education classes 90 minutes a day for READ 180. Kim Urbanski knew that this is what took place that first month. I felt because of this, she wanted to be at this "goal meeting" because of what happened that first month with the SPED students and program at Blair. I felt Kim would validate and help Bob with any special education issues and laws. As union president, John, would validate contractual issues, since Peters had overloaded me the first month. I knew Kim understood why I had to be removed from Read 180; I felt she wanted to be at this meeting to make sure the SPED students were protected since it is her responsibility. I looked at this meeting as an opportunity to create a fresh start and clear the air of unresolved issues.

When I arrived, I again handed Peters my 2-page goal document dated September 29, 2006. I was "upbeat"; relieved to have others' present to document this meeting.

Peters handed me his list of "Evaluation Goal Areas for 2006-2007". He said at this time, that he could not recommend me for Tenure if these goal areas were not addressed. I said, "No Problem, I am doing all these now. I can prove this". When I said this – Bob Peters paused, looked at Kim then changed the entire subject to Kim's new car; discussing her new car at great length, while I sat there and listened. There was virtually no discussion of either my goals or Peter's. However, I was not worried because I was doing all the 8 bullets. I was not worried because there were 2 other adults in the room to validate the list he handed me. Also, this was a casual list; not a formal Individual Development Plan as required by the collective bargaining contract.

As to the 8 bullet goals Robert Peters handed me:

1. Implement district curriculums [Proof: See student daily HW books sheets with Guided Reading, Read Natural, 180 HW; Blair cupboard: SRA PHONICS, Explode the Code, Modem Curriculum Press, COVE -- digraphs 1 & 2, Qualitative Reading Inventory, Angling for Words, Quick Reads, Project Read, Rigby Leveled Books, and many more].

2. Conduct/coordinate student assessments (PLAPF, goal progress) [Proof: See student Progress Reports, and individual PLAPF].

3. Support general education assessments (CAAP, MEAP, NAEP) [Proof: See individual student CAAP completed with me. teacher 'Key", Speak with students, teachers, aides with me during the MEAP, see HW sheets with MEAP "readiness" to parents preparing for students for good rest and healthy breakfast each day of the MEAP; ask students what "healthy snacks" I provided in the rooms with MEAP students, what room?, NAEP, See Henry Hafer, Administrator from NAEP, and my requested meeting to make sure my students individual "accommodations" were written before this very important National Exam. Speak with the NAEP people, who were "highly complimentary of my student's behavior, my responsibility to give them breaks, healthy snacks, with ice water and a slice of lemon.]

4. IEP/MET deadlines met [Proof: The MET is not my responsibility, IEP deadlines were met, unless a parent canceled illness, Peters canceled (TW), or

"other" administrator canceled, re: first year lawsuit took priority to AM's scheduled IEP.]

5. Other Special Education paperwork deadlines met [Proof: "What other?" Medicaid? My Medicaid was on time. I was continuously communicating, with the Medicaid Director, Ms. Deb Johnson. Deb understood the added workload first year; serving on TCAPS lawsuit; (requiring me to be gone from the classroom 23 days which meant substitutes for 23 nights). She understood the number of students we had receiving Medicaid, at Blair. Bob Saunders and I each had 17 Medicaid students as opposed to other schools who had 3-4. Ms. Johnson would tell me, "Susan, don't worry about them getting to me right now; your Medicaid are prepared so beautifully. Many TCAPS teachers do not call Deb Johnson. She does not receive them until summer. I have heard that some teachers refuse to do them at all because of the extra paper burden. It is not part of the job description. I would never deny this to my district, however I would ask for more time; particularly when I am giving "more of my time" to serve on their lawsuit (never disclosed to me at the lime of the interview), and the second year – extreme overloading all September; spilling over to fall due to students not able to handle continuous changing schedules.

6 IEP service times met – [Proof: Read 180's GE assignment 13 additional SPED students for 90 minutes daily. Servicing 21 + 13 SPED students daily = 34 SPED students. Reducing time to 2/3 a day for 21 SPED students ranging in grades first – sixth. These 21 students had multiple disabilities with 3 of the very severe behavior students requiring many unsafe, defiant, eloping behaviors. These students required

almost all day with me. The Problem: The GE Read 180 took 90 minutes daily reducing my teaching time. Legally 4 of these students were not receiving their Procedural or Substantive rights by law at this time. Robert Peters was resistant, would not listen, look at, and check into. It was Susan's fault; as told administration, "She wanted to do, but changed her mind". TRUTH: No administrator looked at the Grant to properly implement this legally for the students, and for the teachers "as the chosen staff" to teach this GE program. See student schedules around specials, lunch, recess, library, etc. After READ 180, scheduling could not be done "overnight". Student needs, appropriate groupings for safety to learn took some time around 12 teachers, 6 grade levels, and multiple disabilities. Parents consulted for permission to re-schedule for "appropriate" groupings. Minutes kept track of and made up.

This is why I kept going to Peters, Urbanski, Scrudato, and State of MI. Peter's statements at this time demonstrate the intensity and worry I was feeling. Robert Peters states that I was "Hyper-focused on student support time.; Concerns about student scheduling,/support times.; Can't change staffing formulas, laws, processes, paperwork.; Settle down – relax.; Student needs determine goals and support time.; Focus on students and things you can effect change in". In essence he was complaining that I was too worried about delivering the special education resources mandated by their IEPs. Principal Peters' solution: "stop homework books". However, Homework Books were never the problem. Peters felt if you get rid of the Homework Books- that will release the aide to go out and service more students. This was illegal. The aide was not lawfully qualified to teach for minutes. It

was the minutes to service students that were missing. It was also illegal to not work on the IEP goal written.

Final Retaliation-February 27, 2007
Termination Based on False Concerns and Supports

On February 27, 2007 I was shown a document entitled "Supports and Concerns" prepared by Robert Peters. This document came as a complete surprise to me. The so-called "supports" were mandatory professional development days and in-service training as required by the state of Michigan. These in-service days were not exclusive to me, but were required by all staff, or all SPED teachers at the school level or district level.

In his "concerns" and testimony Peters states that he met with me March 3, 2006, and March 8, 2006 regarding various problems. This is untrue. I did not meet with him on those days nor were any these issues discussed. As an example on March 8th he states "Again told to stop using homework notebooks due to amount of time needed to support this-aide time." Compare these false statements to the evaluation in my employee file prepared by Robert Peters dated March 23, 2006 (see Ex. A, in Brief) which states "She works to accomplish this involvement with daily homework books that are filled out at school, reviewed daily with the students, and sent home for review at the end of the day. Often notes are written to parents within the homework books for parent review."

Obviously, he did not tell me to stop using these-in fact he praised their use. The books were part of the presentation in my initial interview when I explained

their effectiveness in achieving student goals and objectives as it relates to "personal responsibility and work completion". The interviewing committee enthusiastically received these books and Peters was well aware of the intended use of these books to meet goals and objectives of the IEPs. In fact all of my students' IEPs which were signed and approved by Peters state: "Will use a homework book daily, filled out by the teachers, taken home, checked by mom nightly; returned each a.m. for the teachers to check". This mandates their use by law. He further states in the evaluation "Her transition following the hiring process was very minimal, yet she worked hard since her feet hit the ground here."; Mrs. Fox has demonstrated the ability to provide a sound instructional setting for her students within her classroom. She had collaborated creatively with our K-2 Special Education Teacher and several general education teachers..."

Peters list of "concerns" dated September 25, 2006 states that I was unable to handle my caseload. As stated above my caseload was both legally and physically impossible to achieve. Peters features the caseload adjustment as an accommodation to me when in fact he obviously was told that they were in violation of the law and for that reason alone the caseload adjustments were made.

He also states that there was "an inability to schedule properly and to use my aide correctly". Robert Peters was under the misconception I could have more time if I used my aide to provide teaching minutes that could not be met by the SPED teacher. This, however, is beyond the scope of duties allowed by Michigan law. The findings from the Investigation substantiated

TCAPS using the paraprofessionals illegally. This state Investigation also found Traverse City was in violation of rules, [300.323(c) (2) and Rule 340.1749 a (2) (a)], stating "when the teacher was unable to provide direct instruction to SPED students because the district had assigned the SPED teacher simultaneously to provide direct instruction in a GE Reading 180 program in another classroom". This investigation took place 6 months after I was coerced into resigning. This Investigation demonstrates how the Traverse City Public Schools were continuing to break laws and refusing to follow procedures for the special education students and special education teachers. This older teacher is no longer with the district.

Robert Peters states as a "concern" dated October 5, 2006 that I did not have prepared a "behavior plan" completed for EI students. Peters is referring to one of my students (KM). Peters never asked me to do a contingency plan for this student or for any other student during the entire time I was at Blair. My experience has been that these are done by the principal.

Peters lists as a "concern" dated October 5, 2006 that I used an incorrect form. In fact, in October, I needed as assessment for an occupational therapy student and asked Robert Saunders what form to use. He told me to use the one in the file cabinet. Later I found out that the district had recently adopted a new form. Peters said nothing to me about this all the time. This pretext only came up in February of 2007. He did not write me a note as he stated nor was this outside of this student's IEP.

His various "concerns" with IEPs has been addressed, above.

The October and November 2006 "concerns" relating to placement, scheduling, IEPs, service time to students were all caused by the rescheduling burden placed on the students and me by the READ 180 program initiated unlawfully by Peters (see above). My students were in a state of confusion and crisis after schedules changed October 2, 2006. My job was to take care of the needs to my struggling children. I was not receiving support from the principal at this time when the students would act out and need office behavior support, or I needed his support with least restrictive environment with PP, or I needed support to test my students in a quiet environment. After READ 180, the upper grades (4th, 5th, 6th) needed to send students to me in the morning to fit their schedules. This change impacted the younger students learning times in the a.m. The room was small. There was a big 6th grader who was defiant and abusive that now had to come to the morning class. This student was abusive to an autistic child in that class. I contacted the mother and told her that he should not be in this classroom and that the minutes would be made up She was very appreciative and cooperative.

I advised Robert Peters that rescheduling was going to be difficult because the older students were now in classes with younger children. I assured him I was talking to parents and keeping track of any minutes. Parents of the younger students were very appreciative of my concern and my many contacts during this time to provide a safe and appropriate time for their child to come into the classroom. Many of the students could not handle the change. He was indifferent to student

needs, progress with curriculum, safety, behaviors and accommodating general education teachers' schedules. My principal did not care about any consultation to help my students.

In regard to another situation a student moved to Michigan from California, where he was enrolled as a full time self-contained SPED program in Calif. The full-time program was the only program offered SPED students at the Calif. school. In his IEP were reading, math goals, and high minutes. In the MET (psychologist testing) it was determined that PP was at grade level for math. I met with Diane Morris (English as second Language teacher) at out school to go over PP's MET. As I understand Jody Scott (4th grade teacher) went to Peters and wanted PP out of her classroom for math because of math goals written. I understood Jody, however I was undermined by Robert Peters because he never came to me directly with Jody's concerns. This information was purposely kept from me until the last minute when I understood the confusion. I could have solved the problem, dealt with Jody directly, and avoided the "Staffing" dilemma Robert Peters was furious with me when I told him PP was on grade level for math with his MET scores and that Diane Morris our ESL teacher was adamant that he stay in general education. He told me I was not meeting minutes. I tried to explain Least Restrictive, the MET report, the self-contained school he came from in Calif., the psychologist recommendation that PP not be removed from general education math. Peters did not care. He told me to put PP in my classroom for 795 minutes. This was clearly not "Least Restrictive" for my student. I called the ESL Director, Kathy Stranton to inform her of Peters; unreasonable demand. We had a meeting (staffing) to discuss the

issues surrounding PP. The Team agreed that PP needed to be in GE math. I did my job. I was written up for advocating least restrictive environment for my student which is mandated by law. Other teachers were not.

Another example of rescheduling a student after Read 180 is KW; her IEP was tabled. I had been trying to get KW's current IEP for 3 weeks. Ms. Marj Middel (SSW) notified me that she had an incomplete file and "Missing Current IEP". I spoke with the administration to help find (they use a program called "ROSRS") and they could not find the it. I expressed concern to Ms. Susan Haughn, a SPED specialist and part of the IEP team, asking for direction. Ms. Haughn volunteered to try to find the missing paperwork since she is at the ISD once a week. The meeting was set for the 10/26/2006 IEP. I went ahead with KW's IEP; knowing I would table the IEP. I felt that this Level 3 behavior (severe) student would probably need more than one meeting to build a good PLAN/PROGRAM for her. I was glad I did hold the IEP because I was able to meet the tribe Social Worker (Kathy Garza) who was a wonderful support KW. On October 26, we started the work to put KW (and the family) on a program with the homework books. Kathy Garza saw the parents daily that first 2 weeks to check to make sure KW was following the book. The mother and father were both expected to work with KW nightly. KW responded well. KW's IEP was rescheduled for November 14. The entire Team was in attendance. KW's behaviors had improved dramatically. The Team went from 750-825 minutes per week to 450-600 minutes per week because there was progress with behaviors and academics. After Read 180, KW had to be protected from the older students coming during her

scheduled time with me. The tribe social worker was contacted, as well as the parents. KW was highly reactive to the 6th grade bully. Safety and learning was compromised at this time. The general education teacher completely changed her language arts time to the afternoon to accommodate for her high minute, level 3 behavior students coming to me. Schedules settled down once this took place. Robert Peters wrote me up because of the change in minutes for KW; misrepresenting the truth about this student and all that went into the IEP, the TEAM work and the progress that K W made.

After READ 180, rescheduling was very extremely difficult for the struggling students, the 12 teachers, whose schedules were set from the beginning of the year. Robert Peters was using this time to look for any little things that I might be able to use against me. Because of level 3 severe behavior students, the Behavior Specialist was brought to the building. Level 3 students are provided this behavior support from the SPED department. This support was not exclusive to me. The behavior assistant, Ms. Lori Kalena, was assigned to assist with the three Level 3 students at Blair. Ms. Kalena reported, November 2006, "The room is too small. There are too many students. You have so many students at different levels with behavior needs. You do not have the support you need. More aide time is needed with KM's high minutes and DS behavior needs". Ms. Kalena returned in the spring to say "Hi" and see how I was doing. I told her Bob Peters wrote down that I had received 23 support visits from TBA. She was astonished, and said, "Susan, you did not have more than 6-8 support visits". She was happy to see a normal caseload at this time. She wondered how I survived the fall.

In addition, in November of 2006 guest teacher, Ms. Susan Summers, completed a Daily Substitute Teacher Report to Robert Peters. Ms. Summers reported, "Too many students at a time, too many students requiring one-on-one due to LD or behavior issues or both, too quick turn key, too few teachers!!!!!!! ..... and there were 3 of us !!!!????" Ms. Summers concluded by saying, "I worked as a teacher's aide in an Emotionally Impaired Learning Disabled classroom ... (for 2 years) and feel that this classroom requires 2 fully certified teachers and 2 full-time aides. . . . AT LEAST!)." Robert Peters called me into his office the next morning (as I walked into school). He told me he did not like my guest teacher the day before. I thought the comment strange until I saw the write up on my desk.

When the general education teacher mentioned above volunteered to move her language arts to the afternoon (not easy for her) everything minutes per week. Schedules were appropriate and behaviors settled down. Peters did not care to see how hard I was working, the GE staff was working to make things right for the students. Peters "watched" and "listened" for any slight error of minutes to "peg" me for his documentation. I was shocked to read all Peters nit-picking documentation used against me. He was denying these students support, denying me support, and using this time against the students and me. Peters was assigning me to work with students and other personnel during my lunch hour and planning period. At the time that he was complaining that IEP schedules were not met, we were re-working schedules (sometimes 3 times), consulting with 14 teachers, social workers, behavior specialists, speech, OT, PT and all the parents, and in addition to accommodating the specific needs of these special education students

and their "appropriate curriculum, environment and learning groups. He gave "minimum effort" to me or the students to help right-a-wrong not caused by me or my students It was administration's choice to ignore special education; even when the Read 180 grant director, Ms. Terry Sheldon who brought READ 180 to Blair was specifically told how to "legally use" the SPED teacher to teach in this reading intervention program but she ignored this directive. (See Exhibit D)

G. Plaintiff Was Held to a Higher Standard Than Other Teachers. Robert Peters suggests that one of the reasons for my termination was that my IEPs were late, however, this is common and unavoidable. For example:

1. Teacher Consultant, Michelle Thomas held an IEPC meeting which was 39 days overdue for (H.E) Another students D.U was overdue by 21 days. Both were signed by Robert Peters. On another occasion.

2. Special Education teacher, Robert Saunders, was 14 days overdue (M.O.) on an IEP due Dec. 4, 2006, held January 4, 2007. This was 14 days overdue, and signed by Robert Peters;

3. Special Education school social worker (SSW) Susan Haughn failed to provide me with student goals. objectives, present levels, prior to a IEP Team Meeting, as required. Ms. Haughn was sent a formal invitation, we discussed ahead of time the up coming IEP, she was called the day before and the day of the IEP as a final reminder. Ms. Haughn's goals, objectives, and report of progress were not turned in. Robert Peters would not allow me to "Table" this IEP due to her missing reports. I wrote "Tabled" across the top of the

IEP, but Mr. Peters instructed me to white out "Tabled". I wanted to "Table" the IEP because the required reports were not available. While away from my classroom the following day, Mr. Peters supported Ms. Haughn going into my private cupboard and altering the IEP. I reported this to the supervisor of special education in a letter. I shared his information with Marie Collins Gilmore, the assistant superintendent of special education at the ISD, August 2007. Ms. Gilmore said Ms. Haughn was procedurally incorrect.

4. Robert Peters charged me with violating FERPA (a law requiring secrecy as to certain student records) for bringing my student's Behavior Plan into the lounge. My 6th grade student DS had pushed and hit his sixth grade teacher, Ms. Danielle Brostrum. I walked into the lounge to find Ms. Brostrom extremely upset and surrounded by other teachers: Ms. Pierson, Ms. Domine, and others. The teachers were talking about filing a complaint against my 6th grade student, DS. Not wanting to have any procedural mistakes, I went to get DS's Behavior Plan to make sure DS was where he should be at the time of the incident and that the Plan had been followed. FERPA allows teachers to discuss a child with "other school officials including teachers within the educational institution or local educational agency in relation to the goal of educating the child." I had to review the Plan with people involved to confirm DS's Plan was followed. I did my job to make sure that correct procedures had been adhered to protect the school and teachers who had a right to file this complaint. None of these teachers were written up and/or reprimanded for using a student name, and reviewing a behavior plan in the lounge with people who needed to know.

5. Finally, Robert Peters failed to attend 3 IEP meetings without having first obtained pre-approval by the Supervisor or Director of Special Education. He is part or the IEP team and is required to attend. He then misrepresented that he was in attendance.

In summary, the so-called "concerns" are a pretext. Peters judged me differently than other teachers, specialists, and himself.

Departmentalization

Defendants are now justifying my unlawful caseload and class sizes based on "departmentalization". This pretext is after the fact Obviously, if this were the case it would have been in my employee file. Further, each of the IEPs for all of my special education students has a box indicating whether there is departmentalization. All of the IEPs state that the classes are not departmentalized. These IEPs are all signed by Robert Peters.

Tom Freeman from the Department of Education Compliance Office advised me that "Few (if any) elementary schools in the state of Michigan are departmentalized. It is a major program change and must be checked legally on page 6". A SPED departmentalized program must be set up with the correct number of teachers to support the program and must benefit the students (substantive and procedurally). Departmentalization is used at a high school level, where one teacher might teach math all day (algebra; basic, advanced, and the other teacher, teaches all reading, literature classes). It is done this way to have less lesson planning, to be able to be more efficient. Elementary students cannot handle changing

teachers every hour. Emotionally the elementary multi-disabled and multi age levels special education students cannot handle different teachers every hour with different rules and directions; moving to different classes.

By law I was not to have more than 12 SPED students at one time; I had 15 SPED students in a given hour, and at times 16.

The first and only time that I was advised that we had been "departmentalized" was an email from Robert Peters after READ 180 program was cancelled.

/s/ Susan M. Fox
Susan M. Fox, Affiant

STATE OF MICHIGAN)
) ss.
COUNTY OF MIDLAND)

On this 4th day of March, 2009. before me, a Notary Public acting in and for said County and State, personally appeared the above-named Susan M. Fox, who, being duly sworn, depose and says that she has read the foregoing instrument, by her subscribed and knows the contents thereof and that the same is true of her own information and belief, and as to those matters she believes it to be true.

/s/
Notary Public
County, Michigan

My Commission Expires: June 7, 2013

[seal]

173 (2)

No. 10-229

Supreme Court, U.S.
FILED
OCT 18 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUSAN M. FOX,

Petitioner

v.

TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS and ROBERT T. PETERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE SIXTH CIRCUIT CORRECTLY FIND THAT PLAINTIFF'S COMPLAINTS ABOUT HER CASE LOAD OF SPECIAL EDUCATION STUDENTS DURING A FOUR WEEK PERIOD IN WHICH SHE WAS TEACHING A REMEDIAL READING CLASS MADE SOLELY TO HER DIRECT SUPERVISORS DURING REGULAR SCHOOL HOURS AND ON SCHOOL PREMISES WERE MADE AS AN EMPLOYEE NOT AS A PRIVATE CITIZEN AND THEREFORE HER SPEECH WAS NOT PROTECTED PURSUANT TO THE HOLDING OF THIS COURT IN *GARCETTI v CEBALLOS*, 547 US 410 (2006)?

II. DID THE SIXTH CIRCUIT CORRECTLY FIND THAT PLAINTIFF FAILED TO MEET HER BURDEN OF SUBMITTING EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT THAT SHE WAS SPEAKING AS A PRIVATE CITIZEN AS OPPOSED TO AS AN EMPLOYEE?

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COUNTER-STATEMENT OF THE CASE

This action arises out of the non-renewal of plaintiff/petitioner's contract as a probationary special education teacher. She began working for Traverse City Public Schools ("TCAPS") at Blair Elementary School beginning with the 2005-2006 school year. By March of 2006 the school principal, respondent/defendant Robert Peters, began documenting problems with her performance.

Despite performance issues, TCAPS chose to offer plaintiff a second probationary contract for the 2006-2007 school year. TCAPS wanted to avoid having to search for a replacement so soon after hiring her and hoped she would improve.

Plaintiff's performance did not improve significantly and on February 27, 2007, she was notified of the decision to not renew her contract. She claims the non-renewal was retaliation in response to complaints that she was assigned to teach too many special education students in violation of state and federal law.[1]

Plaintiff admitted in her deposition that the claim of excessive caseload is based solely on a four week period in which she instructed a section of a remedial

---

1. Mr. Peters and Christine Davis, TCAPS Executive Director of Human Resources and Labor Relations, both testified that plaintiff never complained to them that the school was violating any laws. Nor did they receive any reports from anyone else that plaintiff had made such allegations prior to the decision to not renew her contract. (*See*, Affidavits, Exhibits D and G to Def. Br. Docket Nos. 69-8 and 69-11).

reading program known as Read 180. The program was first implemented at Blair Elementary at the beginning of the 2006-2007 school year. Plaintiff taught a Read 180 class from the end of August until September 25, 2006, when she was removed due to poor performance.

Plaintiff's performance did not improve after removal from the READ 180 program. She was advised that her performance was deficient on several occasions during the five months between removal from the READ 180 program and notification of the non-renewal.

Plaintiff's complaint alleged six counts: (1) Violation of Civil Rights (Free Speech and Association); (2) Violation of Michigan Public Policy; (3) Retaliation; (4) Improper Interference with Employment Contract; (5) Civil Conspiracy, and; (6) Violation of the Michigan Whistleblowers Protection Act, ("WPA"). The district court dismissed counts 4 and 5 with prejudice on December 10, 2008, in an order granting in part and denying in part Plaintiff's Second Motion for Leave to Amend the Complaint.

Defendants filed a motion for summary judgment regarding all remaining claims. The district court held that the WPA claim was barred by the applicable 90 day statute of limitations and provided the exclusive remedy thereby precluding a separate claim alleging violation of Michigan Public Policy arising out of the same occurrence.[2]

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2. Plaintiff did not appeal the dismissal of Counts 2, 4, 5 or 6. Her appeal was limited to the dismissal of her First Amendment and retaliation claims which were set forth in Counts 1 and 3.

In regard to the free speech claims, District Court Judge, Robert Jonker, found as a matter of law that plaintiff was not speaking as a private citizen when she complained to her supervisors about the number of special education students she was assigned to teach. He based his decision on the Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and the Sixth Circuit cases of *Weisbarth v. Geauga Park Dist*, 499 F.3d 538 (6th Cir. 2007) and *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007). The Sixth Circuit affirmed the grant of summary judgment.

Plaintiff has now petitioned this Court for a Writ of Certiorari. This request should be denied. The district court and Sixth Circuit correctly applied this Court's holding in *Garcetti* to the facts of this case. Her alleged complaints arose directly out of her duties as a special education teacher. She complained of being assigned an excessive workload. She testified to working extensive overtime and complained that it was physically impossible to meet the demands of her job. She attempted to justify poor performance based on complaints of excessive work load. She testified that the caseload violated her contract and it was her job to advocate for the students.

Plaintiff specifically testified that she was fired for doing her job and holding the school district to the terms of her contract. She agreed that as a special education teacher it was part of her duties to participate in preparation, implementation and monitoring of the Individual Education Plans ("IEPs") prepared for special education students. The IEPs set forth the minutes of instruction to be provided to the students,

the areas of instruction and describe how the students' specific needs will be met. Plaintiff also served as a member of school improvement and special education committees. Her duties in these roles included providing comment on the level of service to students and methods of improving instruction.

This is not an appropriate case for this Court to address the split within the Federal Circuits regarding whether the question as to the role in which a government employee speaks (i.e. employee or private citizen) should be reviewed as a matter of law or as a mixed question of law and fact. As the Sixth Circuit held, the material facts in this case are undisputed and plaintiff's comments were made as an employee. Moreover, it was plaintiff's burden to submit evidence showing she spoke as a private citizen rather than as an employee. Her failure to do so cannot create an issue of material fact. Thus, regardless of the standard of review the correct decision was reached.

Finally, plaintiff's suggestion that different standards should apply to government employees based on whether they exercise discretion or perform ministerial tasks would subvert the holding of *Garcetti* and unnecessarily hinder the ability of local governments to manage their affairs. Such a standard would transform "run of the mill" work place grievances into constitutional claims. Moreover, plaintiff did not perform merely ministerial tasks. She was responsible for exercising judgment as to the instruction of the students on her caseload. She specifically testified to disagreements with the administration regarding curriculum and use of her preferred teaching methods.

She also volunteered and persuaded Mr. Peters to assign her to instruct the reading program which resulted in her complaints of being over-assigned.

COUNTER-STATEMENT OF FACTS

A. Problems with Plaintiff's Performance in 2006.

Plaintiff's performance proved to be deficient in numerous areas. After approximately six months, Mr. Peters began documenting performance issues. Her performance deteriorated over time. Concerns during her first year of employment included: (1) failure to submit Individual Education Plans in a timely manner; (2) improperly instructing a special education assistant to complete paperwork; (3) complaints from parents that plaintiff improperly recommended medications; (4) lack of efficiency in completing tasks; (5) failure to communicate with a parent; (6) submission of an IEP without the required signatures, and; (6) failure to establish student goals. (*See*, Exhibit C, File maintained by R. Peters documenting performance issues and Exhibit D, Affidavit of R. Peters attached to Def. Br. Docket Nos. 69-7, 69-8 and 69-11)

B. Read 180 Program.

During the summer of 2006, Mr. Peters decided to implement the Read 180 program. Read 180 was developed to assist students encountering difficulty with traditional methods of learning to read.

Plaintiff learned of the proposed implementation and asked for assignment to the program. Mr. Peters

reluctantly acquiesced in response to plaintiff's insistent and repeated requests. Plaintiff taught the course for approximately four weeks. Mr. Peters removed her due to poor performance on or about September 25, 2006. (Exhibit D and Exhibit H attached to Def. Br. Docket Nos. 69-8 and 69-12)

There were 15 special education students in the READ 180 class. The class was 90 minutes in length. Two of the 15 students were part of plaintiff's special education caseload. The remaining 19 students on her case load were receiving instruction in math from special education teacher, Robert Saunders, during the 90 minute class period. Both plaintiff and Mr. Saunders received credit toward meeting special education minutes for the students on their case loads participating in the READ 180 program and the math class. (Exhibit I, R. Peters Dep.(12/10/08) at pp. 131-132 attached to Def Br. Docket No. 69-13)

The special education regulations provide for what is known as departmentalization in a school employing more than one special education teacher. Under departmentalization a special education teacher is allowed to instruct up to the combined number of students on the participating teachers caseloads during a single class period. (As many as 42 based on two teachers with 21 student caseloads) The teachers cannot provide instruction in more than one subject per period and cannot serve more than 12 students on average per day. (See, Exhibit J, CFR. 340.1749 a-c, attached to Def, Br. Docket No. 69-15).

Mr. Peters testified that special education at Blair Elementary was departmentalized during the READ

180 program. (Exhibit I, R. Peters Dep. (10/1/08) at pp. 12-13, Docket No. 69-13) Thus, Ms. Fox could teach 15 students in the READ 180 program while Mr. Saunders taught math to the other students. (Exhibit D and Exhibit H attached to Def. Br., Docket Nos. 69-8 and 69-12).

C. Problems With Plaintiff's Performance After Read 180.

Following her removal from the Read 180 program plaintiff was still unable to handle her duties. She testified to being required to work until 9:00 or 10:00 p.m. on a regular basis. She was unable to complete her IEP reporting duties in a timely manner. She was again instructed not to use teacher's assistants to complete paperwork.

Plaintiff was unable or unwilling to meet deadlines regarding student documentation. In addition to regularly submitting late and/or incomplete IEP reports, plaintiff failed to comply with deadlines for submission of Medicaid forms (Exhibit N attached to Def. Br. Docket No. 69-18).

D. Plaintiff's Testimony.

Plaintiff agreed that with the exception of the four weeks when she taught a section of Read 180, she was assigned a case load of no more than 21 special education students. She agreed that a caseload of up to 21 students was allowed under the applicable laws and regulations. Thus, her purported complaints of excessive caseload involve only a four week time frame. (Exhibit B, pp. 26-33, and 68-71, attached to Def. Br. Docket No. 69-6)

Plaintiff acknowledged that Mr. Peters complained about her failure to perform her work in a timely manner. She was late with completion of Medicaid forms. Scheduling of IEP's did not occur on a timely basis and she admitted being late for meetings. *Id.* at pp. 84-85, 118. She told Mr. Peters she was having difficulty getting her work done from October 2006 through February of 2007. (*Id.* at 114 -115) She reported these same difficulties to her union representative, Mr. John Scrudato. (Exhibit R attached to Def. Br. Docket No. 69-22)

Plaintiff admits there were discussions about the fact she did not use the approved curriculum. (Exhibit B, pp. 118-124 attached to Def. Br. Docket No. 69-6) She testified to disagreeing with the TCAPS curriculum as follows:

> Q. Let me ask you this: Does the TCAPS curriculum cover the five components of reading instruction?
>
> A. Not in the way that these students needed it.
>
> Q. Says who?
>
> A. Says myself and my experience. (*Id.* at p. 130).

Plaintiff agreed she was notified of deficiencies in her performance prior to February 27, 2007. She admitted having her special education assistant complete paperwork. Plaintiff recalled there being an

issue with a parent of one of her students related to communication, spelling program, tap sheet, instructional minutes, student progress and medication. *Id.* at pp. 134-147.

Plaintiff sent an e-mail to her union representative, John Scrudato complaining about the demands of her job. She complained about having a lot of high minute students but did not claim her caseload violated the law. She admitted deficiencies in her performance. The e-mail is dated February 25 or two days before the meeting where she resigned. (*Id.* at pp. 165-166 and Exhibit R, attached to Def. Br. Docket Nos. 69-6 and 69-22)

Despite the claim of oppressive work demands, she volunteered to serve on "so many committees," including School Improvement, Behavior Committee, SPED Committee. She also shared responsibility with Bob Saunders regarding TASC meetings. She testified to feeling overworked and overloaded. (Exhibit B, pp. 166-169, Docket No. 69-6)

Plaintiff agreed concerns were raised regarding her performance on several occasions after removal from the Read 180 program. She recalls a meeting in November where she was warned that if she did not meet her goals tenure would be denied. She admitted to making mistakes. *Id.* at 174-189.

Plaintiff testified to taking medication for ADHD for 25 to 30 years. She started taking anti-depressants in the summer of 2006 after her first year with TCAPS. She was exhausted due to her first year at TCAPS and having to deal with a divorce. *Id.* at pp. 155-156.

E. Plaintiff's Testimony Regarding the Alleged Statements.

Plaintiff claims to have told her immediate supervisors during September of 2006 that her assignment to teach the Read 180 class along with her regular special education caseload violated state and federal law. She does not claim to have made any other complaints about caseload until the February 27, 2007 meeting. Her comments at that time were made in rebuttal to the list of deficiencies cited as the reasons for the non-renewal.

Plaintiff testified **it was her job to report the alleged violation of law and to protect the children.** She testified that defendants Bob Peters and Chris Davis along with her union representatives tricked her into resigning on February 27th. When asked why defendants would do that, plaintiff responded:

> A. Because I held them to the law. I held them to the law, I protected the children, **I did my job, and I wouldn't stop it, and I held them to my contract**, I told all the people that were in that room except for Don Hakala, I told them all. (Exhibit C, S. Fox Dep. at p. 142, attached to Def. Reply Br. Docket No. 82-5)

There is no dispute that all of the alleged protected speech was made within the employment context. Her complaints about caseload and alleged violations of law were made to her direct supervisors while plaintiff was at school, during normal school hours and were all directly related to her day to day duties as a special education teacher.

It is apparent from her complaints and testimony that the primary focus of her concerns was her claimed inability to instruct 34 special education students in one day. She testified that this inability was due both to legal and physical constraints. She stated it was physically impossible for her to provide the instructional minutes required by her students because of the requirement that she spend 90 minutes per day instructing the Read 180 program. (*See* Exhibit R attached to Def. Br. Docket No. 69-22)

There is no dispute that as a special education teacher she was part of the team responsible for developing, implementing and monitoring IEPs. (See, Pls Br. at pp. 1-3, and 7-13, Docket No. 75) She was required to provide instruction to the special education students according to the terms of their IEPs. The IEPs required that a certain number of minutes of instruction be provided to the individual students in specific areas. *Id.* Her primary complaint regarding the alleged excessive caseload was that she could not provide the level of instruction required by the students pursuant to the IEPs.

Plaintiff also served on the school improvement and special education committees which were established to provide input from teachers regarding student support, budget and programs. As a member of these committees it was part of her duties to provide comment on the level of service provided to the students and methods of improving education. (*See* March 23, 2006 evaluator's summary attached to Pl. Br. as Exhibit A, Docket No. 74-5 to Plaintiff's brief)

REASONS FOR DENYING THE PETITION

I. THERE IS NO BASIS FOR REVERSING THE SIXTH CIRCUIT

The Sixth Circuit correctly held that plaintiff's alleged statements were made pursuant to her duties as a special education teacher and therefore not protected. The decision in this case is consistent with the holding of *Garcetti* and its application by the federal circuit courts of appeal. The federal circuits have consistently held that statements made to facilitate job duties within the chain of command are made as an employee and not a private citizen. This application of *Garcetti* is appropriate and necessary to prevent the transformation of "run of the mill" employee grievances into constitutional claims.

The federal circuits have uniformly found under similar facts that the plaintiff was speaking as an employee and not a citizen. As the Sixth Circuit stated in this case, "Of more immediate pertinence to Fox's claim is the Fifth Circuit's observation that "[c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job." *Quoting, Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008). The Fifth Circuit in *Davis* collected decisions from the other circuits involving similar claims. *See, Spielga v. Hull*, 481 F.3d 961 (7th Cir. 2007) (Report by correction officer to supervisor regarding possible security lapse made as employee); *Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006) (Internal report

of alleged improprieties in handling of federal funds pursuant to duties as financial aid counselor made as employee); *Foraker v. Caffinch*, 501 F.3d 231 (3d Cir. 2007) (Firearms instructors with state police acting as employees when reporting health concerns to supervisor regarding operation of firing range).[3]

A recent example of the consistent and appropriate application of *Garcetti* to complaints made to supervisors in furtherance of plaintiff's duties is found in *Weintraub v. Board of Education*, 593 F.3d 196 (2nd Cir. 2010). The Second Circuit held that a teacher's speech complaining about the failure to suspend students who had committed assault was not protected. The Court held that the speech need not be required by the employee's duties or in response to a request from the employer to have been made as an employee. So long as the speech facilitates performance of plaintiff's job it is not protected. *Id.*

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3. Additional cases from other federal circuits include: *Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007) (Social workers' complaints about excessive caseload allegedly placing children in danger made as employees not private citizens); *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008) (Complaints made by registered nurse to supervisor regarding assignment to care for too many patients, difficulty working with doctors and operation of Emergency Room made as employee not private citizen); *Nixon v City of Houston*, 511 F.3d 494 (5th Cir. 2007) (Statements made by police officer to media critical of policy regarding pursuit of fleeing vehicles made as employee and not private citizen where made in furtherance of duties); *Phillips v. City of Dawsonville*, 499 F.3d 1239 (11th Cir. 2007) (Complaints by City Clerk regarding Mayor's alleged misuse of funds for personal purposes made to City Attorney and City Council members made as employee and not private citizen)

As the Second Circuit noted this test is supported by this Court's opinion in *Garcetti* which held that the determination of whether the employee spoke pursuant to his duties is a practical one. It is also consistent with the conclusion that government could not function effectively if every employee grievance became a constitutional matter.

In *Boyce, supra*, the Eleventh Circuit addressed facts analogous to those in the present case. Plaintiffs were managers employed by the DeKalb County Department of Family and Children Services. They complained of excessive caseloads and mismanagement which they warned could endanger children exposed to abuse. The complaints were made to supervisors. The Eleventh Circuit held that the speech was made pursuant to their duties despite the lack of responsibility or control over the size of their caseload. The complaints were made in an effort to facilitate their duties. As the Court stated:

> Significantly, Boyce and Robinson were complaining to their superiors as employees about their workloads for a work reason: they wanted to have their caseloads reduced or to receive help with their work. The purpose of their grievances clearly was not to raise public awareness about children within the care of DeKalb DFCS. If that had been their intention, then they would have identified the children who were in danger. . . . The record shows that this was an internal employee matter and that Boyce's termination and Robinson's transfer were internal decisions by

> their supervisors to accomplish the work of DeKalb DFCS.
>
> * * *
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> Based upon review of the entire record, Boyce and Robinson "primarily spoke" as employees to improve their work environment; they represented that they were overworked and overwhelmed. As in *Garcetti* the "controlling factor" was that their expressions were made pursuant to official duties . . . and the main thrust of their speech took the form of a private employee grievance.
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> * * *
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> Because Boyce and Robinson spoke as government employees about their jobs and not as citizens, they have no First Amendment cause of action based on their employer's reaction to the speech and there is no need to engage in the Pickering balancing analysis. *Id.* at 1346.

The federal district courts have also consistently applied *Garcetti* to find that speech made under circumstances similar to the present case was not protected. For example, in *Yatzus v. Appoquinimink School District*, 458 F.Supp.2d 235 (D. Del. 2006), plaintiff was a school psychologist who complained that the school district was not complying with legal requirements and testing of special education students and certain district employees were disrespectful to the

students and their parents. *Id.* at 241. Her supervisor allegedly retaliated by issuing reprimands for failing to complete IEP paperwork. *Id.* As the Court stated:

> Plaintiff asserts that she engaged in speech as a citizen addressing matters of public concern and not as a school psychologist. She contends that her correspondence to District administrators concerning problems with the special education program and her assistance to a parents group caused defendants to issue reprimands for the purpose of building a record that would justify terminating her employment.
>
> Defendants contend that plaintiff's complaints that the District was violating federal requirements and discriminating against special needs students is not speech protected by the First Amendment because plaintiff's statements were part of her job responsibilities. Because plaintiff testified at her deposition that it was part of her job "to report what [she] perceived as illegal behavior" and to assist parents with OCR complaints, defendants assert her speech is not protected under the standards announced by the Supreme court in *Garcetti*. *Id.* at 245.

The Court agreed with defendants finding that plaintiff made her comments as part of her job responsibilities as a school psychologist thus precluding liability under the First Amendment. The Court did so based in part on plaintiff's deposition where she

acknowledged her duties included participation in the IEP process and being an advocate for the children. She also testified that it was part of her job as the school psychologist to report illegal behavior. *Id.* at 245-246.

In *Ryan v. Shawnee Mission Unified School Dist*, 437 F.Supp.2d 1233 (D. Kan. 2006), plaintiff was a school physical therapist assigned to work with special education students. Her employment was terminated after several disputes with her supervisor regarding the manner of service to be provided to students on her caseload. Similar to the case at issue, she complained the school was violating state law by requiring her to provide physical therapy to students without first obtaining a doctor's order. She also contacted a state agency regarding her complaints. The court found that her speech alleged to have been made to advocate for better treatment of students was all made pursuant to her duties as a school physical therapist and arose directly out of her role as a government employee. *Id.* at 1246-1251. The court also found that plaintiff's complaints were directed only internally, focused on her individual situation and did not involve issues of public concern. As a result, her First Amendment retaliation claims were dismissed with prejudice. *Id.* at 1251-1253.

As these cases demonstrate, the federal circuit and district courts have consistently applied the holding of *Garcetti* to find that internal speech intended to facilitate employment duties, is not protected. This is a correct application of *Garcetti*. The communications owe their existence to the duties the employee was required to perform and involve traditional employee-employer grievances which as this Court noted in *Garcetti* should not be constitutionalized. As stated in *Garcetti*:

> When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. . . . Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. . . . [G]overnment offices could not function if every employment decision became a constitutional matter. . . . [T]hat while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance. *Garcetti, supra* at 418-419.

Plaintiff's argument that the Sixth Circuit improperly required that the communication be made to an outside entity is misplaced. The Court of Appeals did not impose any such requirement. Rather the identity of the person to whom the communication is directed is one important factor in determining if the speech was made as a private citizen rather than as an employee. When statements are made to the media or other outside agencies by employees without management responsibilities there is compelling evidence that the speech was made as a citizen on issues of public concern as opposed to an employee grievance. The fact the Sixth Circuit noted the importance of such evidence and its presence as a distinguishing feature in several cases does not equate to the imposition of an additional necessary element.

The holding in *Reinhardt v. Albuquerque Public Schools*, 595 F.3d 1126 (10th Cir. 2010) does not support

plaintiff's argument. The only true similarity between *Reinhardt* and the present case is that each involved a school employee providing services to disabled students. Unlike the present case, *Reinhardt* involved: (1) the filing of a formal complaint with an outside agency; (2) the hiring of an attorney to prosecute the formal complaint; (3) advocacy for the rights of a specific student to receive a neuropsychological evaluation; (4) a plaintiff employed as a speech pathologist who was not responsible for development, implementation and monitoring IEPs, and; (5) an alleged systematic denial of services to disabled students over a period of years. *Id.* at 1130 1131.

There is no reason to suspect that the Tenth Circuit would have reached a different result than the Sixth Circuit in the present case. A significant distinction between *Reinhardt* and the present case lies in the fact that plaintiff went beyond the chain of command and reported the alleged violations to an outside agency. Even with such facts, the Tenth Circuit's opinion suggests it was a close decision. As the Court stated:

> In Brammer-Hoelter, we indicated that "speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform. Thus the fact that it was not expressly Ms. Reinhardt's duty to report IDEA violations to NMPED is not dispositive on whether she was acting pursuant to her duties. While we have held that if speech reasonably contributes to or facilitates the employee's performance of the official duty,

> the speech is made pursuant to the employees duties, it would be going too far to hold that every time a public employee discovers alleged wrongdoing related to his job and brings it to the attention of law enforcement or other outside parties, the speech is unprotected. After all, "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.
>
> Ms. Reinhardt was not hired to ensure IDEA compliance at Albuquerque public schools. She was hired to provide speech and language services to special education students. Ms. Reinhardt's consulting an attorney and filing the state complaint went well beyond her official responsibilities. *Id.* at 1136.

There is nothing surprising or inconsistent about the result reached in *Reinhardt*. The holding is consistent with the rule uniformly applied by the other federal circuits that speech made in furtherance of employment duties is not protected. As the Tenth Circuit noted, the actions taken by Reinhardt, who was a speech pathologist, including statements made to an outside agency to which she did not report on a regular basis along with the filing of a formal complaint and hiring or an attorney went well beyond facilitation of her duties.

In the present case there are no alleged statements or actions other than those directly linked to facilitation

of plaintiff's duties as a special education teacher.[4] There is simply no evidence to support a finding that she spoke as a citizen as opposed to as an employee.

II. PLAINTIFF FAILED TO SUBMIT EVIDENCE CREATING A MATERIAL ISSUE OF FACT.

This case does not provide a basis for deciding whether the role in which an employee speaks should be analyzed as a question of law or as a mixed question of fact and law. As the Sixth Circuit held there was no dispute regarding any material fact in this case.

Defendant submitted ample evidence showing that plaintiff's statements were made pursuant to her job duties. She testified that it was her job to advocate on behalf of the students. She testified that the reason her contract was not renewed was because she did her job and held the school district to the terms of her contract. There was no dispute that her duties as a special education teacher included formulating, implementing and monitoring IEPs. To the extent her complaints were related to insufficient minutes of instruction being

4. Nor does the Sixth Circuit case of *See v. City of Elryia*, 502 F.3d 484 (6th Cir. 2007) support plaintiff's claims. The plaintiff in *See* was a police officer who made a report of misconduct to the Federal Bureau of Investigation and provided statements included in a newspaper advertisement. He brought suit against the chief of police and the City. The district court granted summary judgment to the City and that decision was not appealed. An interlocutory appeal was filed regarding the denial of qualified immunity to the individual defendant chief of police based on the argument that the statements made by plaintiff were false and reckless. There was no discussion of *Garcetti* and defendant did not argue that the speech was made pursuant to plaintiff's duties.

provided to her students this was part of her responsibility as a special education teacher. Finally, there was no dispute that plaintiff served on the school improvement and special education committees. Her duties as a committee member were to comment on whether the students' needs were being met and to offer suggestions for improvement. The undisputed record clearly established that plaintiff's duties included comment regarding the level of instruction provided to special education students and her First Amendment claim was barred by application of *Garcetti*.

Plaintiff had the burden of establishing that she spoke as a citizen rather than an employee. *See, Garcetti, supra* at 547 U.S. 421-22. She failed to produce evidence to meet that burden. It is immaterial whether the issue of the role in which she spoke is analyzed as a matter of law or a mixed question of fact and law. The result is the same under either analysis and there is no opportunity for this Court to resolve any dispute between the federal circuits in this regard.

III. THERE IS NO LEGAL OR POLICY BASIS FOR DISTINGUISHING APPLICATION OF *GARCETTI* BASED ON DISCRETIONARY VERSUS MINISTERIAL DUTIES.

Plaintiff argues that this Court should establish a new test for application of *Garcetti* based on whether the employee exercises discretion or performs primarily ministerial duties. There is no legal or logical basis for doing so. Moreover, the undisputed facts demonstrate that plaintiff did exercise discretion in performing her duties and would not benefit from the proposed overhaul of *Garcetti*.

The test established in *Garcetti*, based on the distinction between speech as a citizen and speech as a governmental employee provides the proper demarcation for protected speech. As this Court held a government employee does not give up the right to free speech by accepting government employment. However, allowing employees to cast work place grievances as constitutional claims serves no legitimate interest and imposes a heavy burden on the proper management of local government.

Adopting plaintiff's proposed distinction between employees exercising discretion and those performing ministerial duties would unduly narrow the scope of *Garcetti* while providing no offsetting benefit. There is no legal or logical reason to treat government employees differently in terms of First Amendment protection based on their position within the management hierarchy. *Garcetti* provides the proper balance. Government employers should have the right to control speech made in furtherance of employment duties while employees should be allowed to continue to exercise the right to speak as a private citizen. The standard proposed by plaintiff would serve no purpose other than to provide lower level employees with leverage in pressing work place grievances by threatening federal lawsuits.

Even if there were merit to plaintiff's proposed change in the law, she would not benefit from such a change and this is not a proper case for establishing such a rule. She exercised significant discretion in performing her duties. Again she was directly involved in decision regarding content and implementation of

student IEP's. She had latitude in terms of deciding how to utilize the agreed upon minutes of instruction. She testified that she determined the method of instruction for her students and was in the best position to determine the curriculum which best met their needs.

CONCLUSION

This case involved a straightforward application of *Garcetti* and the district court and Sixth Circuit properly granted defendants' motion for summary judgment. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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